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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

WILLEM RIDDER, LYNDON C MERKLE, JOHN T HURST, GREGORY DEVANY, PETITIONERS,

v.

OFFICE OF THRIFT SUPERVISION, UNITED STATES DEPARTMENT OF THE TREASURY, AND JONATHAN L FIECHTER, ACTING DIRECTOR, OFFICE OF THRIFT SUPERVISION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ISSUE PRESENTED

Does the United States Constitution authorize Congress to prohibit judicial review of orders or decisions by the Office of Thrift Supervision which in effect deprive persons of property without due process of law?

Reno v American-Arab Anti-Discrimination Committee, 119 F3d 1367 (9th Cir 1997) *cert granted* 141 LEd2d 137, 118 SCt 2059, 1998 US LEXIS 3714 presents a similar issue.

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OFFICE OF THRIFT SUPERVISION, UNITED STATES DEPARTMENT OF THE TREASURY, AND JONATHAN L FIECHTER, ACTING DIRECTOR, OFFICE OF THRIFT SUPERVISION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Willem Ridder, Lyndon C Merkle, John T Hurst and Gregory DeVany petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 146 F3d 1035 (Appendix A). The order of the district court dismissing Petitioners' claims (Appendix B) is not reported.

JURISDICTION

28 USC §1254(a) confers jurisdiction on the Supreme Court. The United States Court of Appeals for the District of Columbia entered judgment on July 17 1998. The Court of Appeals denied petition for rehearing and rehearing en banc on September 17 1998. This Petition is timely presented under Supreme Court Rules 13.1 and 30.1.

CONSTITUTION, STATUTES AND REGULATION

Pursuant to Supreme Court Rule 14.1(f) the full text of these materials is set out in Appendix D.

STATEMENT OF THE CASE

Petitioners, bank officers, bring this action to compel judicial review of refusal by the Office of Thrift Supervision (OTS) to comply with a federal regulation requiring banks to indemnify officers for attorneys fees and costs of defense, and refusal by the OTS to comply with a judgment of the Third Circuit Court of Appeals enforcing such regulation.

The United States District Court for the District of Columbia under FIRREA held that it lacked jurisdiction to review the OTS action, and the US Court of Appeals for the District of Columbia affirmed. The Court of Appeals had jurisdiction over the appeal pursuant to 28 USC §1291.

Petitioners contend that the decisions below violate the US Constitution by purporting to deprive Petitioners of all judicial review, and as violating due process of law as explicated in *Coit Independence v Federal Savings & Loan Insurance Corporation* (1985) 489 US 561. In violation of

due process of law as explained in *Coit*, the OTS regulations fix no time limit for a final decision on Petitioners' claims. Ten years have passed since the OTS appointed the Resolution Trust Corporation to be receiver of City Federal Savings Bank; eight years have passed since Petitioners demanded indemnification from CityFed Financial Corporation, the savings bank holding company; and more than four years have passed since the OTS entered a "temporary" order prohibiting CityFed Financial Corporation from paying its obligations without the consent of the OTS. No end to the OTS litigation with CityFed Financial Corporation is in sight.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Supreme Court should grant the writ to announce a rule that due process of law requires lower courts to grant meaningful and timely judicial review of decisions by administrative agencies which deprive persons of property.

In the alternative, the Supreme Court should grant the writ to correct a misreading by the courts below of FIRREA, thereby avoiding the serious constitutional question created if the lower courts are held to lack jurisdiction.

The issue presented by the present case is similar to the issue presented in *Reno v American-Arab Anti-Discrimination Committee*, 119 F3d 1367 (9th Cir 1997 *cert granted* 141 LEd2d 137, 118 SCt 2059, 1998 US LEXIS 3714.

Facts

In 1986 Northwest Mortgage Corporation, a New Jersey mortgage banker, ran a $7.5 million kite on First Fidelity Bank. First Fidelity Bank discovered the kite in January 1987, called the loan and recovered its money. Northwest thereupon applied to City Federal Savings Bank, the largest thrift in New Jersey, for a $30 million line of credit. In June 1987 the insider officers and directors (excluding the present Petitioners) approved the $30 million line of credit. Northwest promptly misused its new line of credit by running a $7 million kite to cover losses incurred as a result of interest rate fluctuations in April and October 1987.

Kevin Corcoran, the officer who recommended the ill-fated Northwest Mortgage line of credit (and not a Petitioner herein), found it timely to quit on March 31 1988.

Petitioner Ridder, as the President of City Collateral, located in California, inherited the responsibility to deal with the Northwest Mortgage loan. Ridder assigned Petitioner Hurst, also located in California, to supervise the account and Hurst assigned Petitioner DeVany[1] to call on Northwest Mortgage. DeVany on his first visit to Northwest Mortgage in April 1988 discovered the Northwest default and reported

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1. City Collateral hired DeVany as a trainee in March 1988. City Collateral hired Merkle in July 1987 to set up computer and other loan control procedures. Merkle never had anything to do with the Northwest loan except that reports on all loans were printed under Merkle's computer programs and distributed to loan officers.

it to Hurst. Hurst on his next visit to the East Coast called upon Northwest, discussed the default, and on the advice of counsel placed Northwest on a program to work out the default by eliminating all loans in warehouse over six months.

Petitioners on behalf of City Federal reduced advances to Northwest Mortgage from $20.3 million in June 1988 to approximately $10.7 million in November 1988 and then discontinued further advances to Northwest Mortgage.

The Northwest kite thereupon crashed. In December 1988 Northwest's owner then admitted that it had run a kite on City Federal to cover losses suffered by Northwest in April and October 1987, long before Petitioners had anything to do with the Northwest Mortgage line of credit.

The City Federal collections reduced the balance due to some $7.8 million which City Federal was unable to collect. As a result, City Federal filed suit against Northwest Mortgage in November 1989 for the balance of $7.8 million. About the same time City Federal was forced to recognize losses of $200 - $300 million on ill-advised speculative building projects in Florida and New Jersey.

The ~~Office of~~ Thrift Supervision (OTS) appointed the Resolution Trust Corporation (RTC) to be receiver of City Federal Savings Bank in December 1989. The RTC made claim against Fidelity & Deposit Company of Maryland under a fidelity bond to reimburse City Federal for the $7 loss on the Northwest Mortgage line of credit. To justify the claim against F&D, the RTC charged Petitioners Ridder, Merkle, Hurst and DeVany with fraud relying upon a memorandum from a City Federal attorney (later an RTC attorney) asserting "Enough to squeak out a claim?"

Procedural history

Three years later in 1992 the RTC filed suit in the US District Court, District of New Jersey, against F&D and Petitioners to recover the in excess of $7 million on the Northwest Mortgage line of credit. The RTC expired under the act of Congress which created it and the FDIC has succeeded the RTC.

Petitioners Ridder et al denied the RTC charges of intentional wrongdoing and fraud and filed suit against CityFed Financial Corporation (the company which held all stock of City Federal Savings Bank) to advance their attorneys fees and costs of defense as required by the bylaws of CityFed and by 12 Code of Federal Regulations §545.121(f). CityFed refused to pay on the theory that Ridder et al might in fact be guilty of fraud and intentional wrongdoing *Ridder v CityFed Financial Corp*, 47 F3d 85 (3d Cir 1995) rejected that argument and ordered the District Court to fix the amounts to be paid by CityFed to Ridder et al for attorneys fees and costs.

More than two years after the RTC filed its complaint against F&D and Ridder et al, the OTS issued a cease and desist order (OTS Order No AP 26-97 dated June 2 1994, the "Temporary Order") limiting CityFed's monthly expenditure of funds to $15,000 plus attorneys fees for CityFed's defense costs. This order was affirmed in *CityFed Financial Corp v Office of Thrift Supervision*, 58 F3d 738 (DC Cir 1995). The OTS seeks to defeat claims of all other parties and to recover all assets of CityFed Financial Corporation in reliance upon an agreement by CityFed to maintain the net worth of City Federal Savings Bank.

CityFed did not comply with the judgment of the

Third Circuit in *Ridder v CityFed Financial Corp*, 47 F3d 85 (3d Cir 1995). Instead it appealed a second time to the Third Circuit. CityFed argued that the OTS temporary order made CityFed unable to comply with the injunction. The Third Circuit by unpublished opinion dated April 18 1996 remanded the case to District Court for the District of New Jersey with the instructions:

> Under the circumstances, there are a number of options available for relieving CityFed from its conflicting and legally untenable dual obligations. **[1]** The district court might stay its injunction pending resolution of the OTS administrative proceeding. **[2]** It might modify its order to condition CityFed's obligation upon OTS' granting permission to make payment. **[3]** The court might also entertain an application by Plaintiffs for leave to execute on the funds in possession of CoreStates bank, while inviting and favorably acting upon a renewed application by the OTS for intervention, thereby framing that issue for adversary litigation. There are obviously some timing decisions to be made among these alternatives, and we leave it to the district court on remand to invite submission from all interested parties including the OTS and frame an appropriate order [Numbers in brackets added]. *Ridder v CityFed FinCorp*, No 95-5558, slip op (3d Cir 1996).

CityFed reported the district court's orders to the OTS by letter. The OTS then came to the self serving

determination that the CityFed report to the OTS was an application for "hardship" relief. The OTS followed its first self serving determination that the CityFed letter was an application for hardship relief with the second self serving conclusion that it was no hardship to CityFed to be allowed to evade its obligations to employees such as Ridder, Merkle, Hurst and DeVany. The OTS reached this conclusion in support of its claim that the OTS should recover all CityFed assets to pay the OTS claim under a CityFed agreement with the OTS to maintain the net worth of City Federal Savings Bank.

Ridder et al filed the present action within ten days of the OTS orders. The district court and court of appeal held that Ridder et al had no standing because they had not been served with the OTS orders and that these courts lacked jurisdiction to review the OTS orders.

What remained of the RTC/FDIC case against the Petitioners after summary judgment in favor of F&D has been settled for a nominal amount.

ARGUMENT OF REASONS FOR GRANTING THE PETITION

1. The Supreme Court should rule that Congress lacks authority to deprive lower courts of all power of judicial review of administrative decisions depriving citizens of significant property rights.

Where, as in this case, a person is deprived of his property without a hearing, a statute purporting to restrict the jurisdiction of the courts is itself unconstitutional. *Weinberger v Salfi*, 422 US 749, 762 (1975); *Federal*

Reserve Board v MCorp, 502 US 32, 43 (1991). Whether or not Petitioners' claims fall within the jurisdiction afforded by 12 USC §1818(c)(2), the district court below had general federal question jurisdiction to consider Petitioners' constitutional claims under 28 USC §1331. Justice Story noted in *Martin v Hunter's Lessee* (US 1816) 1 Wheat 304:

> The first section [of Article III] declares, "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may, from time to time, ordain and establish." The second section declares, that "the judicial power shall extend to all cases in law or equity, arising under this constitution,[and] the laws of the United States .... 1 Wheat at 327.
>
> Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. * * * (Id at 328).

Justice Story continued:

> The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one supreme court, and in such inferior courts as Congress may from time to time, ordain and establish. (Id at 328.) * * *
>
> If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest

> the whole judicial power. The language, if imperative as to one part, is imperative as to all. (Id at 330).
> * * * * *
> It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance. * * * (Id at 331).

To deny the district court jurisdiction in this case would be to wholly deprive Ridder, Merkle, Hurst and DeVany of a meaningful and adequate means for vindicating their constitutional rights.

In *Battaglia v General Motors Corp,* 169 F2d 254 at 257 (2d Cir 1948) the Second Circuit clearly enunciated the applicable rule:

> A few of the district court decisions sustaining section 2 [removing jurisdiction from the federal courts] of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. *** These district court decisions would, in effect, sustain subdivision (d) of section 2 of the Act regardless of whether subdivisions (a) and (b) were valid. We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, **while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power**

> **as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.** *** Thus, regardless of whether subdivision (d) of section 2 had an independent end in itself, if one of the effects would be to deprive the appellants of property without due process or just compensation, it would be invalid. 169 F2d at 257. (Emphasis added.)

Indeed, the Court of Appeals for the District of Columbia itself squarely held that a statute would violate due process of law if it permitted an administrative agency to deprive a citizen of property without allowing any judicial review by a lower court. *Bartlett v Bowen*, 816 F2d 695 (DC Cir 1987) involved a statute restricting challenges to claims made for benefits under the Social Security Act. Bartlett had received Medicare benefits for extended nursing care in a Christian Science facility. The Medicare regulations denied such additional payments for extended nursing care for the same spell of illness in a non-Christian Science facility because Bartlett had already received benefits for extended nursing care at the Christian Science facility.

The court of appeals held the purported restriction to be unconstitutional. First the court held that the jurisdictional restriction did not bar challenges to the constitutionality of the Medicare Act itself. Second the court held that even if the statute did attempt to bar such challenges it was unconstitutional.

> **In our view, a statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of**

> **separation of powers, and deprives an individual of an independent forum for adjudication of a claim of constitutional right.** We have little doubt that such a "limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal legislation would be [an] unconstitutional" infringement of due process. *Bartlett v Bowen,* 816 F2d at 703 (Italics in original)[emphasis added].

The court found that the Fifth Amendment prohibition against taking property without due process of law deprives Congress of power to prohibit all judicial review of administrative decisions.

> In considering the constitutional issue, it is important to recall that, in the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment. Quite the contrary, **on the few occasions when this issue has been considered, courts have declined to find an intention on the part of Congress to preclude all judicial review of constitutional claims.** *Bartlett v Bowen,* 816 F2d at 704 [emphasis added].

a. The courts below should have exercised jurisdiction to avoid the serious constitutional question which is raised if FIRREA is read to prohibit all judicial review by the lower courts.

The decisions below in this case overlook United States Supreme Court authority on this point. In *Bowen v Michigan Academy of Family Physicians*, 476 US 667 (1986) the US Supreme Court held:

> The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of "amount determinations" – i.e. those "quite minor matters," 118 Cong Rec 33992 (1972) (remarks of Sen Bennett), remitted finally and exclusively to adjudication by private insurance carriers in a "fair hearing." n10. By the same token, matters which Congress did not delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law. In the face of this persuasive evidence of legislative intent, we will not indulge the Government's assumption that Congress contemplated review by carriers of "trivial" monetary claims, ibid, but intended no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program. n11. This is an extreme position, and one we would be most reluctant to adopt

without "a showing of 'clear and convincing evidence,'" Abbott Laboratories v Gardner, 387 US, at 141, to overcome **the "strong presumption that Congress did not mean to prohibit all judicial review" of executive action, Dunlop v Bachowski**, 421 US, at 567.

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n12 **Our disposition avoids the "serious constitutional question" that would arise if we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B of the Medicare program.** Weinberger v Salfi, 422 US, at 762 (citing Johnson v Robison, 415 US 361, 366-367 (1974). See Yakus v United States, 321 US 414, 433-444 (1944); St Joseph Stock Yards Co v United States, 298 US 38, 84 (1936) (Brandeis, J, concurring); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan L Rev 895, 921, n 113 (1984). ("[All] agree that Congress cannot bar all remedies for enforcing federal constitutional rights"). Cf Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv L Rev 1362, 1378-1379 (1953). It also accords with our decision in Schweiker v McClure, 456 US 188 (1982), in which we resolved a constitutional challenge arising under Part B of the Medicare program. *Bowen*, 476 US at

680-81 (Emphasis added).

> Notwithstanding these substantial institutional interests, federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. Colorado River Water Conservation Dist v United States, 424 US 800, 817-818, 47 L Ed 2d 483, 96 S Ct 1236 (1976). We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (Citation omitted). *McCarthy v Madigan*, 503 US 140, at 146 (1992) .

b. The decisions below violate the long established rule that courts will construe statutes to preserve preexisting rights in order to avoid questions of violation of the Constitution.

The rights of Ridder, Merkle, Hurst and DeVany to advance of attorneys fees and costs of defense vested during their employment by City Federal or its subsidiary from 1984 to 1988. By contrast, of the statutes relied upon by the OTS, FIRREA was signed on August 9, 1989, and the Crime Control Act of 1990 was signed on November 29, 1990.

In *United States v Security Industrial Bank*, 459 US 70 (1982) the court held that the lien avoidance provisions of the Bankruptcy Reform Act of 1970 (11 USC §522(f)(2)) did not apply retroactively to liens established before enactment of the Act. The lienholders contended and the bankruptcy court held that application of the Bankruptcy Reform Act to preexisting liens would violate the Fifth Amendment

prohibition against taking property without just compensation. Then Justice Rehnquist noted:

> The foregoing discussion convinces us that there is substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment. * * * We consider the statutory construction question because of the " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided'." Lorrillard v Pons, 424 US 575, 577 (1978), quoting Crowell v Benson, 285 US 22, 62 (1932). *Security Industrial Bank*, 459 US 70, at 78.

Justice Rehnquist held that the Act did not destroy preexisting liens. After a careful review of the cases, Justice Rehnquist held:

> Neither these cases, nor any other that has come to our attention, casts doubt on the principle of statutory construction deducible from Holt and Auffm'ordt: No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. 459 US at 81.

Congress has made no such explicit command in FIRREA or in the Crime Control Act of 1990, and it would violate due process of law and the constitutional prohibitions on bills of attainder and ex post facto laws if Congress purported to do so. Indeed, to the contrary the Supreme Court recently held that FIRREA could not lawfully divest members of the

savings and loan industry of pre-existing contract rights. *United States v Winstar Corp*, 518 US 839, 135 LEd2d 964, at 993 (1996) expressly noted:

> Cf *Edward J DeBartolo Corp* v *Florida Gulf Coast Building & Constr Trades Council*, 485 US 568, 575, 99 L Ed 2d 645, 108 S Ct 1392 (1988)("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

The Court continued:

> The dissent's only answer to our concern is to recognize that "Congress may not simply abrogate a statutory provision obligating performance without breaching the contract and rendering itself liable for damages." 135 LEd2d at 997.

The present situation is identical: If the court holds that Congress abrogated the right of Petitioners to advance of their attorneys fees and costs of defense, then the United States becomes liable for damages in the identical amount for taking of private property without just compensation.

c. The district court should have exercised jurisdiction pursuant to the rule that courts have authority to enjoin acts by an administrative agency which are unconstitutional or violate the terms of the statute conferring authority on the agency.

Leedom v Kyne, 358 US 184 (1958) and subsequent cases authorize the district court to exercise jurisdiction in this case. In *Leedom v Kyne* the NLRB held that a unit for collective bargaining could include both professional and nonprofessional employees, even though the statute expressly prohibited such bargaining units.

The Labor Management Relations Act also did not authorize review by a United States District Court of bargaining unit determinations by the NLRB. The National Labor Relations Board argued that the statutory provisions governing review of final NLRB orders in the court of appeals indicated an intent to bar review of NLRB action in the district court. The US Supreme Court rejected that argument, holding that

> This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 US at 190.

After *Leedom v Kyne* the rule has been applied in other actions challenging agency action involving financial institutions. In *Abercrombie v Office of Comptroller of Currency*, 833 F2d 672 at 675 (7th Cir 1987) the court stated:

> Courts have, however, created a limited exception to § 1818's specific withdrawal of jurisdiction from the

> district courts for actions by the Comptroller that clearly depart from his statutory authority. (Citations omitted). The district court recognized this exception to § 1818(i)(1)'s express withdrawal of jurisdiction.
> ***
>
> The so-called "statutory authority" exception originated in three Supreme Court cases: Leedom v Kyne, 358 US 184, 79 SCt 180, 3 LEd2d 210 (1958); Oestereich v Selective Service Local Board No 11, 393 US 233, 89 SCt 414, 21 LEd2d 402 (1968); and Breen v Selective Service Local Board No 16, 396 US 460, 90 SCt 661, 24 LEd2d 653 (1970). *** In these three cases, the Court allowed district courts to enjoin or set aside agency action despite statutory review provisions that seemingly deprived the district courts of jurisdiction. 833 F2d at 675.

These first cases involved agency action where alternate means of judicial review was either uncertain or inadequate so that no adequate judicial remedy existed for the victims of the agency action.

A concurrent line of cases allows judicial review where action by an administrative agency violates the constitutional rights of a party. Thus a district court may enjoin agency action that amounts to a "plain violation" of a constitutional right. *Squillacote v International Bhd of Teamsters Local 344*, 561 F2d 31, at 39 (7th Cir 1977); *McCulloch v Libby-Owens-Ford Glass Co*, 403 F2d 916, at 917 (DC Cir 1968). A plain violation is one in which a provision of the statute is unconstitutional on its face. *Grutka v Barbour*, 549 F2d 5, at 8 (7th Cir 1977), *cert den* (1977) 431 US 90 *Zipp v Geske & Sons, Inc*, 103 F3d 1379, at 1383 (7th Cir 1997).

In the present case, the Petitioners challenge the constitutionality of an order issued under 12 USC § 1818(c)(1) purporting to prohibit payment of CityFed assets to satisfy an order of the United States Court of Appeals for the Third Circuit vindicating their right to indemnification of attorneys fees and costs . The 12 USC §1818(c)(1) proceedings, as applied to Petitioners, are unconstitutional because as construed by the courts below, they deny Petitioners due process of law, including the simple opportunity to be heard by the OTS before the OTS deprives them of their property right to indemnification for attorneys fees and costs of defense.

The OTS argues that the district court has no jurisdiction to consider Petitioners' claims, and emphasizes that they are not parties named in the OTS order prohibiting payment, even though Petitioners are the only parties adversely affected by the OTS order. According to the OTS the Petitioners have no forum in which to obtain judicial review of their federal constitutional claims that the statute, as applied to them, is unconstitutional. Under the rulings in *Bartlett* and *Battaglia* such a scheme is clearly unconstitutional and unenforceable.

d. The rulings below violate due process of law as prescribed in *Coit* because the OTS regulations fix no time limit for the OTS to make a ruling.

Finally, it is insufficient remedy for Ridder, Merkle, Hurst and DeVany to merely await the outcome of the OTS administrative proceeding against CityFed. *Coit Independence v FSLIC*, 489 US 561 (1985) held that the district court had jurisdiction to pass on a state law claim

asserted by the plaintiff without awaiting a final determination by the FSLIC. The opinion noted:

> As of the date of oral argument, Coit's claim had been pending before FSLIC for over 13 months, and FSLIC had yet to make its initial determination. Since the Bank Board itself can take six months to dispose of any appeal, Coit's claim has essentially been relegated to a "black hole" from which it may not emerge before the statute of limitations on Coit's state law claims has run. Administrative remedies that are inadequate need not be exhausted. Greene v United States, 376 US 149, 163 (1964); Smith v Illinois Bell Telephone Co, 270 US 587, 591-592 (1926). * * *
>
> The lack of a reasonable time limit in the current administrative claims procedure renders it inadequate for several reasons. First, it allows FSLIC to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs. Second, it may enable FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts. These concerns are only exacerbated by the fact that FSLIC itself is often the main creditor against the assets of a failed savings and loan association, and thus may well have an incentive to delay decision on large claims

> against an insolvent's assets such as the claim filed by Coit.
>
> Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures. Coit is thus entitled to proceed directly to court for a de novo determination on the merits of its state law claims. 489 US at 586-587.

See also *McCarthy v Madigan*, 503 US 140, at 146-147 (1992).

The court of appeals' decision in the present case fails even to cite *Coit Independence v FSLIC*, which held that the district court had jurisdiction to pass on a state law claim against a savings and loan bank asserted by the plaintiff without awaiting a final determination by the FSLIC. Petitioners' claim for advance of attorneys fees and costs is a state law claim. *O'Melveny & Myers v FDIC*, 512 US 79 (1994).

In *Coit* plaintiff sued to recover on state law claims against a failed savings and loan institution. The effect of the FSLIC action on the plaintiff in Coit was thus identical to the effect of the OTS action on Petitioners in the present action: Coit was a creditor of the failed savings and loan bank; Ridder et al are creditors of the holding company of a failed savings and loan bank.

If the court of appeals' decision were sound, the US Supreme Court would have denied the appeal in *Coit* on the ground that Coit was merely a creditor of the failed savings and loan bank and that FSLIC orders thus only had an "indirect" effect on Coit.

The OTS administration action against CityFed has

been pending since 1994 without final decision. CityFed's requests to pay Petitioners' attorneys fees and costs were denied in OTS Order Number AP 95-32 issued August 18 1995 (39 months ago) and 96-12 on April 8 1996 (31 months ago). Thirty-nine months and thirty-one months respectively are periods longer than the thirteen months characterized by the Supreme Court in *Coit* as so excessive as to make the administrative remedy constitutionally inadequate.

2. The courts below read FIRREA incorrectly. Petitioners are "institution affiliated parties" under 12 USC §1818(c)(2) so that the lower courts have jurisdiction to review the OTS order as it applies to Petitioners.

The district court below held that it lacked jurisdiction to entertain Petitioners' challenge to the OTS Temporary Order as applied to them. The district court held that the Petitioners were not a "depository institution concerned" or an "institution affiliated party." The court therefore held that it lacked jurisdiction over their action for an injunction pursuant to 12 USC §1818(c)(2) . Since 12 USC §1818(i)(1) provides that "except as otherwise provided in this section no court shall have jurisdiction" to affect any temporary order issued by the OTS under 12 USC §1818, the district court dismissed Petitioners' claims.

But the statute explicitly provides that Petitioners Ridder et al were each an "institution-affiliated party" because that term means:

> (1) Any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured

depository institution

*** (Emphasis added).

12 USC §1813(u). Because Ridder et al were officers, employees and agents of City Federal, an insured depository institution, each was an "institution-affiliated party" as defined in the applicable statute, and entitled to challenge the Temporary Order under section 1818(c)(2).

The district court held that it was not enough for Ridder et al to be an institution-affiliated party of City Federal, but that they instead had to be an institution affiliated party of CityFed, the holding company. As the district court stated the issue:

> Plaintiffs maintain that because they were officers of City Federal they met this definition. However the statute, and common sense, clearly require that the party be institutionally affiliated with the depository institution that is the subject of the challenged order.

(App B-8 n 2).

The courts below have the statute completely wrong. City Federal is the only "depository institution" in the case. CityFed - the parent bank holding company - is not a "depository institution." Indeed, the OTS has jurisdiction to issue temporary orders against CityFed only because 12 USC §1818(b)(3) provides in part:

> (b)(3) This subsection [(b) authorizing temporary orders] shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company.

CityFed is a bank holding company (12 USC §1813(w)(1)) and is not a depository institution. Thus the Petitioners were

"officers, directors, employees or agents" of the only depository institution affected by the order.

What is equally obvious is that the Petitioners are third party beneficiaries of the CityFed bylaw directing CityFed to reimburse them for their attorneys fees and costs of defense because they were employed by City Federal, the "depository institution" owned by CityFed. Indeed, Petitioners Ridder et al are the **only** persons adversely affected by the OTS orders denying consent to compliance by CityFed with the order of the Third Circuit to advance their attorneys fees and costs of defense to Petitioners.

The only common sense reading of 12 USC §1818(b)(3) is that Ridder et al, as employees of the insured "depository institution," have standing to challenge the Temporary Order which the OTS claims prohibits CityFed from complying with the judgment of the Court of Appeals for the Third Circuit.

The contrary reading by the court below implies that the OTS can avoid judicial review entirely by any party simply by failing to name that party in its Temporary Order or by the equally arbitrary act of failing to serve a copy of the order on the party affected.

CityFed and its managing directors spent four years and untold dollars fighting the attempts by Ridder et al to recover their attorneys fees and costs of defense. The Court of Appeals for the Third Circuit rejected the CityFed defenses and ordered CityFed to advance attorneys fees and costs of defense to Petitioners.

Thus CityFed and its managing directors are only too happy to comply with the OTS interpretation which excuses them from reimbursing Ridder et al for attorneys fees and costs of defense.

The OTS contention and the decisions below create the anomalous if not absurd legal situation that CityFed, the party benefitting from the OTS rulings, has standing to challenge them but that Petitioners, the parties who are directly injured by the OTS rulings, have no standing to challenge them. Such procedure obviously denies Petitioners due process of law.

3. The reasons stated by the courts below for denying judicial review of the OTS orders violate the applicable rulings of the Supreme Court.

a. MCorp does not bar review by the district court because Petitioners have no other forum in which to obtain judicial review if the present action is dismissed.

The circuit court dismisses application of the rule of *Leedom v Kyne*, 358 US 184 (1958) by reliance upon *Federal Reserve Board v MCorp*, 502 US 32 (1991). In *MCorp*, the US Supreme Court rejected a challenge to an administratively imposed cease-and-desist order. But there is a crucial distinction between the status of the corporation in *MCorp* and the Petitioners in this case. The US Supreme Court expressly based its decision in *MCorp* upon the fact that there the corporation had an avenue for judicial challenge of the agency orders - after completion of the administrative proceeding. Thus, the court stated:

> The cases before us today are entirely different from Kyne because FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity

> of the source of strength regulation. If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application. *MCorp*, 502 US at 43-44.

The US Supreme Court therefore distinguished the *Leedom v Kyne* line of cases, in which rejection of exercise of jurisdiction by the district court would leave the affected parties with no right to judicial review of challenged agency action:

> The other cases relied upon by the Court of Appeals -- Bowen v Michigan Academy of Family Physicians, 476 US 667, 90 L Ed 2d 623, 106 S Ct 2133 (1986); Breen v Selective Service Board, 396 US 460, 24 L Ed 2d 653, 90 SCt 661 (1970); and Oestereich v Selective Service Board, 393 US 233, 21 L Ed 2d 402, 89 S Ct 414 (1968) -- are distinguishable from this litigation for the same reasons. In each of those cases, the Court recognized that an unduly narrow construction of the governing statute would severely prejudice the party seeking review, and construed the statute to allow judicial review not expressly provided. *MCorp*, 502 US 44, n16.

b. The effect of the OTS decision on Ridder, Merkle, Hurst and DeVany is not indirect if it deprives them of all right to recover attorneys fees and costs of suit.

The court of appeals cites *O'Bannon v Town Court Nursing Ctr*, 447 US 773 (1980) for its conclusion that Petitioners are not entitled to a hearing for deprivation of property without due process of law because the effects of the OTS Temporary Order on them are "indirect." If the OTS orders have the effect of denying all payment to Petitioners for attorneys fees and costs of suit in defending the RTC case, there is nothing "indirect" about the effect of the OTS Temporary Order on Ridder et al.

Town Court has nothing in common with the present case. *Town Court* involved the Medicare provision that a patient may receive nursing home care

> from any institution ... qualified to perform ... the services ... who undertakes to provide him with such services. 447 US at 779, n 8.

The Department of Health, Education and Welfare notified Town Court Nursing Center that it no longer met the statutory and regulatory standards for skilled nursing facilities and that consequently its Medicare provider agreement would not be renewed. 447 US at 776. The patients filed a complaint against that determination.

The US Supreme Court held:

> [The statute] gives recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the

> choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. 447 US at 785. (Emphasis in original.)

In the present case Ridder et al are not seeking to continue **government** benefits. Rather they are simply seeking to retain the **private contract benefits** they had with CityFed until the government attempted to take them away.

Next the old folks in *Town Court* could continue to get nursing care from any other nursing home certified as "qualified" by HEW. By contrast, Petitioners cannot obtain attorneys fees and costs of defense from anyone other than CityFed.

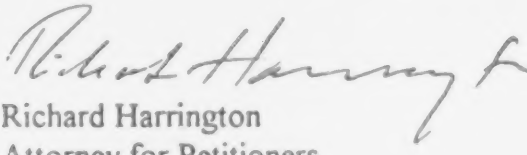
Third the Town Court Nursing Home interests were congruent with those of its residents: Both sought to seek a determination that Town Court was qualified. Petitioners' interests are totally adverse to those of CityFed which has fought tooth and nail to keep them from obtaining attorneys fees and costs of defense and did not contest the OTS decision that CityFed was not entitled to hardship relief in order to obey the judgment of the Third Circuit Court of Appeals that CityFed pay Petitioners' attorneys fees and costs.

CONCLUSION

For the reasons stated this Court should grant certiorari and order that Petitioners be allowed to proceed with their lawsuit against the Office of Thrift Supervision.

Dated December 9 1998

Respectfully submitted,



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 6, 1998 Decided July 17, 1998

No. 97-5181

WILLEM RIDDER, ET AL.,
APPELLANTS

v.

OFFICE OF THRIFT SUPERVISION AND
ELLEN S. SEIDMAN, DIRECTOR,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01656)

Richard Harrington argued the cause for appellants, with whom *James H. McGrew* was on the briefs.

Dirk S. Roberts, Assistant Chief Counsel, Office of Thrift Supervision, argued the cause for appellees, with whom *Thomas J. Segal*, Deputy Chief Counsel, and *Jacqueline H. Fine*, Trial Attorney, were on the brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, SENTELLE and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Four former bank officers appeal the district court's dismissal of a lawsuit they initiated to enjoin the enforcement of a temporary order to cease and desist issued by the Office of Thrift Supervision. We agree with the district court that it lacked jurisdiction to consider this case, and affirm.

I. Background

A.

In 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101–73, 103 Stat. 183 ("FIRREA"), in part " '[t]o improve the supervision of savings associations by strengthening capital, accounting and other supervisory standards' and to 'promote, through regulatory reform, a safe and stable system of affordable housing finance.' " *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 603 (D.C. Cir. 1992) (quoting FIRREA § 101(1) & (2), 103 Stat. 187, 12 U.S.C. § 1811 note). In addition to establishing stricter capital requirements for thrifts, FIRREA also consolidated many of the powers and duties of two prior regulatory bodies in a newly-created entity, the Office of Thrift Supervision ("OTS"). *See American Fed'n of Gov't Employees v. FLRA*, 46 F.3d 73, 74 (D.C. Cir. 1995); *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 741 (D.C. Cir. 1995). Under this statutory regime, when OTS determines that "any insured depository institution ... or any institution-affiliated party is engaging or has engaged ... in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated ... a law, rule, or regulation, or any condition imposed in writing by the agency," it may "issue and serve upon the depository institution or such party a notice of charges ... [which] shall contain a statement of the facts constituting the alleged violation ... and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institu-

tion or the institution-affiliated party." 12 U.S.C. § 1818(b)(1).

OTS is statutorily empowered to "issue a temporary order requiring the depository institution or such party to cease and desist from any ... violation or practice [charged in a section 1818(b)(1) proceeding] and to take affirmative action ... pending completion of such proceedings." 12 U.S.C. § 1818(c)(1). It may issue such an order if it

> determine[s] that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section....

Id.

Congress prohibited courts from reviewing regulated entities' challenges to OTS-initiated proceedings under most circumstances. *See* 12 U.S.C. § 1818(i)(1); *CityFed Fin. Corp.*, 58 F.3d at 741–42. However, the "depository institution concerned or any institution-affiliated party" may appeal to a United States district court from a temporary cease-and-desist order within ten days after being served with the order. 12 U.S.C. § 1818(c)(2). On appeal, a district court may enjoin such an order in whole or in part. *Id.*

B.

In 1984, CityFed Financial Corporation ("Holding Company"), a savings and loan holding company, was created in order to acquire City Federal Savings Bank ("Bank"), a federally insured savings institution. City Collateral and Financial Services, Inc. ("Subsidiary") is a second tier subsid-

iary of Bank. Appellants Willem Ridder, Lyndon C. Merkle, John T. Hurst, and Gregory DeVany are former officers of Subsidiary. *See* Complaint ¶¶ 1–4.

When Holding Company acquired Bank, Holding Company—at the insistence of pre-FIRREA regulatory agency Federal Home Loan Bank Board—agreed to maintain Bank's net worth at a level consistent with regulatory requirements, and also agreed to infuse additional equity capital into Bank if necessary. Holding Company did not live up to these promises. Thus, in 1989, OTS declared Bank insolvent, and appointed the Resolution Trust Corporation ("RTC") as Receiver for Bank.

In 1994, pursuant to 12 U.S.C. § 1818(b)(1), OTS brought administrative enforcement proceedings against Holding Company and seven of its current and former directors. A Notice of Charges and Hearing ("Notice of Charges") charged them with letting Bank's net worth plunge below regulatory requirements by approximately $118 million. The Notice of Charges sought restitution of the $118 million, and demanded payment of over $2 million in civil penalties. Appellants were not named in the Notice of Charges.

Holding Company's assets dwindled considerably after Bank was placed in receivership. Thus, in June 1994, pursuant to 12 U.S.C. § 1818(c)(1), OTS issued a temporary cease-and-desist order ("Temporary Order") which restricted Holding Company's use of its assets. OTS justified its issuance of the Temporary Order by concluding that Holding Company was "likely to cause . . . significant dissipation of assets or earnings of the depository institution." 12 U.S.C. § 1818(c)(1). Under the Temporary Order, which remains in effect, Holding Company is entitled to a $15,000 per month allowance to cover its operating expenses, and may dip into its assets to pay reasonable legal expenses incurred in its own defense. The Temporary Order also contains a "hardship" provision permitting Holding Company to petition for relief if the order's enforcement "threatens to cause undue hardship

to [Holding Company] in conducting its business or affairs." [1] Appellants were not named in the Temporary Order.

In 1992 (two years before the Temporary Order issued), the RTC sued appellants for fraud and breach of fiduciary duty. These claims had nothing to do with the earlier administrative proceedings initiated by OTS. Invoking a provision in Holding Company's bylaws requiring Holding Company to pay the legal fees and expenses of former officers and directors, appellants asked Holding Company to front them the attorney fees and costs they expected to incur in the RTC fraud litigation. When Holding Company refused, appellants sued it in New Jersey district court to compel it to pay the fees. The district court denied appellants' motions for a preliminary injunction and summary judgment. *Ridder v. CityFed Fin. Corp.*, 853 F. Supp. 131 (D.N.J. 1994). The Third Circuit reversed, ruling that Holding Company must advance appellants' litigation expenses, and remanded to the district court for entry of an appropriate injunction. 47 F.3d 85 (3rd Cir. 1995). The Third Circuit, however, did not address whether the Temporary Order might have an impact on its ruling, noting that such matters were "a matter for other tribunals to decide," and "purely speculative" on the record before it. *Id.* at 87–88.

Meanwhile, in a separate action, Holding Company and its directors brought a lawsuit in the United States District Court for the District of Columbia, seeking to enjoin enforce-

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[1] On February 1, 1996, an Administrative Law Judge granted OTS's motion for partial summary disposition of its net worth maintenance claim against Holding Company, recommending that the Director of OTS issue an order forcing Holding Company to pay nearly $120 million in restitution to the RTC, as Receiver for Bank. Holding Company appealed. On appeal, the Director of OTS vacated the ALJ's order, and remanded to the ALJ for further proceedings. In doing so, the Director concluded that additional factual development was required to determine whether Holding Company was unjustly enriched by retaining funds belonging to Bank.

ment of the Temporary Order. The district court ruled against Holding Company, *CityFed Fin. Corp. v. OTS*, 919 F. Supp. 1 (D.D.C. 1994), and we affirmed, 58 F.3d 738 (D.C. Cir. 1995). Among other things, we upheld OTS's authority to issue the Temporary Order, and concluded that Holding Company and its directors had failed to show irreparable harm warranting the injunctive relief they were seeking.

On remand from the Third Circuit, the New Jersey district court entered an injunction requiring Holding Company to advance appellants their legal expenses. Holding Company applied to OTS for payment, but OTS refused, stating that the Temporary Order only permitted the disbursement of funds to relieve hardship to Holding Company itself. Holding Company appealed from the district court's injunction, and the Third Circuit ruled in its favor. The Third Circuit rather colorfully characterized Holding Company's dilemma as follows:

> [Holding Company] is ... caught between Scylla and Charybdis; it stands squarely between two diametrically opposed rulings of two United States Courts of Appeals. The first, a ruling from this Court, directed it to pay [appellants'] legal expenses. The second, a decision from the Court of Appeals for the District of Columbia Circuit, upheld the validity of [the Temporary Order] which prevents [Holding Company] from paying those expenses.

Ridder v. CityFed Fin. Corp., No. 95–5558, slip op. at 4–5 (3rd Cir. Apr. 18, 1996) (unpublished opinion). Recognizing that the Temporary Order made it impossible for Holding Company to comply with the district court's order, the Third Circuit vacated the district court's order, and remanded to the district court for further proceedings.

Shortly after we issued our decision in *CityFed Fin. Corp.*, Holding Company asked OTS for permission to pay appellants' litigation expenses. OTS refused, stating that neither our decision nor that of the Third Circuit compelled it to grant the requested hardship relief. It added that payments to appellants were not entitled to any priority over the claims

of Holding Company's other creditors, and that no such payments could be made until Holding Company met its net worth maintenance obligations.

Finally, we arrive at the lawsuit that gave rise to this appeal. Appellants filed this case in August 1995 in the United States District Court for the District of Columbia, seeking an injunction prohibiting OTS from enforcing its Temporary Order and requiring OTS to authorize Holding Company to disburse approximately $450,000 to them for attorney fees and costs. OTS and its Director were named as defendants in that lawsuit, and are appellees before us.

In a Memorandum and Order, the district court concluded that it lacked subject matter jurisdiction to consider appellants' claims. The court determined that appellants did not qualify as the "depository institution concerned" or an "institution-affiliated party" under the statutory provision permitting judicial review of temporary cease-and-desist orders. 12 U.S.C. § 1818(c)(2). In reaching this conclusion, the court observed that appellants were not parties to the underlying administrative proceeding, that they had not been charged with violations under section 1818(b)(1), and that they had not been served with a temporary cease-and-desist order under section 1818(c)(1). After concluding that section 1818 "does not recognize an independent right to challenge the validity of OTS enforcement orders," the district court dismissed the case for want of jurisdiction. Memorandum and Order at 8.

Appellants filed a timely appeal from the district court's dismissal of their case.[2]

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[2] We note in passing that the district court's Memorandum and Order is procedurally defective because it fails to satisfy Rule 58's requirement that "[e]very judgment shall be set forth on a separate document." Fed. R. Civ. P. 58. This defect, however, has no practical effect on this appeal because it is clear that the district court intended to render a final, appealable judgment. *See* Memorandum and Order at 9 (ordering "that plaintiffs' complaint be and it is hereby dismissed"); *see also Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990) ("mechanical application of the separate-judgment rule should not be used to require the pointless

II. Discussion

We review the district court's legal conclusion that it lacked subject-matter jurisdiction to consider appellants' claims *de novo*. *See United States ex rel Findley v. FPC–Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir.), *cert. denied*, 118 S.Ct. 172 (1997).

A.

"To prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies." *CityFed Fin. Corp.*, 58 F.3d at 741. Indeed, no court may review such proceedings unless section 1818 specifically provides for judicial review:

> *[E]xcept as otherwise provided in this section* no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under [section 1818], or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i)(1) (emphasis added).

Appellants renew their claim that they qualify as "institution-affiliated" parties under subsection 1818(c)(2)—an exception to section 1818(i)(1)'s general prohibition of judicial review—and that their claims are therefore subject to the jurisdiction of the district court. If appellants do not qualify under subsection (c), the only statutory exception they have asserted, "no court shall have jurisdiction" to hear their challenge to the Temporary Order. 12 U.S.C. § 1818(i)(1); *see also Henry v. OTS*, 43 F.3d 507, 513 (10th Cir. 1994) ("In section 1818(i), Congress ... explicitly preclud[ed] jurisdiction in any situation except where it had specifically provided

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formality of returning to the district court for ministerial entry of judgment") (citation omitted). Nonetheless, we again "emphasize that, to avoid dispute and promote certainty, it is the better practice for the district court to assure as a matter of course the entry of each judgment as a separate document." *Id.*

for a particular court to exercise jurisdiction.") (citing *Board of Governors v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991)); *United States v. Spiegel*, 995 F.2d 138, 140 (9th Cir. 1993) ("This statutory language leaves no room to doubt that Congress provided only one avenue for challenging the terms of an OTS restraining order—an action brought under 12 U.S.C. § 1818."); *Carlton v. Firstcorp, Inc.*, 967 F.2d 942, 946 (4th Cir. 1992) ("[I]t seems clear to us that by devising a comprehensive scheme governing the oversight of financial institutions, from administrative control through judicial review of the administrative agency's actions, and by explicitly making the scheme exclusive, Congress intended to exclude other methods of interfering with the regulatory action.").

Appellants propose the following justification for their conclusion that they are "institution-affiliated parties" under 12 U.S.C. § 1818(c)(2). The statute defines "institution-affiliated party" to include "any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution." 12 U.S.C. § 1813(u). According to appellants, Bank was the only "insured depository institution" affected by the Temporary Order. They assert that Holding Company—the entity named in the Notice of Charges and served with the Temporary Order—could not be the "depository institution concerned" for purposes of the statute, because it is a savings and loan holding company, not an "insured depository institution" under section 1813(u). Appellants also assert that three of their number were former officers of Bank. (No such claim was made in their complaint, which alleges only that appellants are former officers of Subsidiary.) As "officers, directors, employees or agents" of Bank, then, appellants claim to be eligible to bring suit as "institution-affiliated" parties.

We shall assume for purposes of this discussion that appellants were indeed employees of (and "affiliated" with) Bank, an insured depository institution. Subsection (c)(2), the provision upon which appellants rely, provides that "the depository institution concerned or any institution-affiliated party" must appeal within ten days after being served with a tempo-

rary cease-and-desist order. In other words, the statute contemplates that "the depository institution concerned or any institution-affiliated party" must be served with a temporary cease-and-desist order in order to challenge it in court pursuant to subsection (c)(2). In this case, neither appellants nor Bank were served with the Temporary Order.

Furthermore, OTS commences administrative proceedings by filing and serving a "notice of charges" on a depository institution or institution-affiliated party. *See* 12 U.S.C. § 1818(b)(1) ("If ... any insured depository institution ... or any institution-affiliated party is engaging ... in an unsafe or unsound practice ... the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof."). Neither appellants nor Bank were named in or served with the Notice of Charges.

Because appellants were not served with (or named in) the Notice of Charges or the Temporary Order, they are not institution-affiliated *parties* as required by subsection (c)(2). *See* BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) ("A 'party' to an action is a person whose name is designated on record as plaintiff or defendant."). Thus, they are statutorily ineligible to file suit under that subsection.

We reject appellants' attempt to characterize themselves as "institution-affiliated parties" because they were affiliated with what they call "the only depository institution concerned" in this case, namely Bank. No matter how profoundly the Temporary Order may have affected it, Bank could not be the "depository institution concerned" in this case. Under subsection (c)(2), a depository institution must have been served with the notice of charges and the temporary cease-and-desist order to challenge that order on appeal. *See* 12 U.S.C. § 1818(c)(2). It is undisputed that Bank met neither of these statutory prerequisites. Even if Bank were a "depository institution concerned" in this case, however, that would not alter the fact that *appellants* were not served with the Notice of Charges or the Temporary Order, as they must be to prosecute an appeal under subsection (c)(2).

Appellants also argue that, although subsection (c)(2) uses the term "depository institution," Holding Company cannot fit this category because it is a savings and loan holding company. This a *non sequitur*. Not only does the statute provide that OTS may issue temporary cease-and-desist orders to "any bank holding company," 12 U.S.C. § 1818(b)(3), we have already concluded that Holding Company was a proper subject of the Temporary Order and, as such, entitled to appeal pursuant to subsection (c)(2). *CityFed Fin. Corp.*, 58 F.3d at 741–43.

B.

Anticipating that the plain language of section 1818(i)(1) might bar their claims, appellants argue in the alternative that the district court should have exercised jurisdiction pursuant to *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny. Under *Kyne*, they argue, district courts may review agency action, even when Congress intended otherwise, if a plaintiff makes a "strong and clear" showing that the agency has acted contrary to its statutory authority or deprived the plaintiff of constitutional rights. *McCulloch v. Libbey–Owens–Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968). Here, appellants argue that the district court should have exercised jurisdiction notwithstanding section 1818(i) because the statutory ban on judicial review allowed a taking of their property without just compensation in violation of the Fifth Amendment to the Constitution. In particular, appellants complain that the restrictions of the Temporary Order forbade Holding Company from disbursing attorney fees and costs to them, even though the Third Circuit had concluded that they were entitled to such payments.

In *Board of Governors v. MCorp Fin., Inc.*, the Supreme Court disallowed a district court's exercise of jurisdiction under *Kyne* in a case that involved section 1818(i)'s preclusion of judicial review. 502 U.S. 32, 44 (1991). MCorp, a bank holding company, filed a lawsuit against the Board of Governors of the Federal Reserve System ("Board") that sought to enjoin the Board's prosecution of two administrative proceed-

ings against it. The district court entered the requested injunction, and the Board appealed. The Fifth Circuit determined that the Board had exceeded its statutory authority when it promulgated one of the regulations MCorp was charged with violating, and ruled that *Kyne* authorized the district court to enjoin the administrative proceedings that had been conducted purportedly without statutory authorization.

The Supreme Court rejected the Fifth Circuit's reading of *Kyne*, and ruled that the district court lacked jurisdiction to enjoin the administrative proceedings pending against MCorp. The Court concluded that Congress spoke "clearly and directly" when it enacted section 1818(i). *Id.* at 44. This provision, continued the Court, contrasted with the statutory scheme at issue in *Kyne*, in which the petitioner had asked the court to *imply* preclusion of judicial review from legislative silence on the point. The Court read *Kyne* to "stand[ ] for the familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review," and determined that section 1818(i) "provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings." *Id.* (citation and internal punctuation omitted). The Court further noted that, unlike the petitioner in *Kyne*, MCorp had adequate means of review upon a final determination by the agency. *Id.* at 43–44.

We conclude that *MCorp*, not *Kyne*, controls this case. First, section 1818(i) unambiguously precludes judicial review. *See MCorp, supra; see also Hindes v. FDIC*, 137 F.3d 148, 164 (3rd Cir. 1998) ("emphasiz[ing] that an integral factor in determining the applicability of the exception is the clarity of the statutory preclusion"). Appellants also have failed to make a "strong and clear" showing that the issuance of the Temporary Order violated their constitutional rights. *See McCulloch*, 403 F.2d at 917.

Appellants make the case that the Temporary Order deprived them of their right to receive attorney fees and costs

from Holding Company without notice and a hearing; this action, conclude appellants, violates the Fifth Amendment's Due Process Clause. It has long been settled, however, that the Fifth Amendment's Due Process Clause "does not apply to the indirect adverse effects of government action." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980). That provision " 'has always been understood as referring only to a *direct appropriation*, and not to consequential injuries resulting from the exercise of lawful power.' " *Id.* (emphasis added) (quoting *Legal Tender Cases*, 79 U.S. 457, 551 (1871)). The Temporary Order was a lawful exercise of OTS's regulatory authority, *see CityFed Fin. Corp*, 58 F.3d at 743, that had no direct effect on appellants. It was issued against Holding Company in order to restrict Holding Company's use of its assets pending completion of administrative proceedings that OTS had commenced against Holding Company. As we have emphasized above, appellants were not named in the Temporary Order, nor did the Temporary Order serve to restrict appellants' use of their own assets. Accordingly, any harm the appellants have suffered from the issuance of the Temporary Order was a consequential result of a lawful action OTS directed towards Holding Company, and therefore was no due process violation.

The Supreme Court has recognized that a person who is indirectly affected by government action may have a right to a hearing under limited circumstances: "Conceivably, . . . if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing." *Town Court*, 447 U.S. at 789–90 n.22. Appellants assert that OTS was indeed targeting them when it issued the Temporary Order, but this unsupported assertion does not meet the standard of a "strong and clear" showing of a deprivation of constitutional rights. In any event, *Town Court* also observed that parties suffering an indirect adverse effect of government action "clearly have no constitutional right to participate in the enforcement proceedings" when the directly regulated party had a "strong financial incentive to contest [the government's] enforcement deci-

sion." *Id.* Here, Holding Company, the directly regulated party, similarly had a strong interest in challenging the Temporary Order, as evidenced by its separate lawsuit challenging the order.

Appellants propose another route to judicial review: the Administrative Procedure Act. They ask us to invalidate the challenged OTS orders as "arbitrary, capricious, an abuse of discretion" under the APA. *See* 5 U.S.C. § 706. However, the APA does not confer jurisdiction when another statute denies it. *See* 5 U.S.C. § 702 ("Nothing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."). Accordingly, in light of our conclusion that section 1818(i)(1) precludes judicial review of the Temporary Order, we reject appellants' APA claims. *Accord Henry v. OTS*, 43 F.3d 507, 511–12 (10th Cir. 1994).

III. Conclusion

Because appellants did not meet the statutory requirements for filing this lawsuit, the district court lacked jurisdiction to hear it. Accordingly, we affirm the judgment of the district court dismissing for lack of subject-matter jurisdiction.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM RIDDER et al

Plaintiffs,

v.

Civil Action No. 95-1656
(HHG)

OFFICE OF THRIFT SUPERVISION
et al.

Defendants.

F I LED
JUN 23 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM and ORDER

Plaintiffs William Ridder, Lyndon C. Merkle, John T. Hurst and Gregory DeVany seek an injunction setting aside, limiting, or suspending Orders of the Office of Thrift Supervision ("OTS"). Defendants are OTS and Jonathan L. Flechter, Acting Director of OTS. This matter is currently before the Court on the parties' cross-motions to dismiss or for summary judgment.

I
Background

Until December 29, 1988 plaintiffs were officers of City Collateral and Financial Services, Inc. ("City Collateral"), a subsidiary of City Federal Savings Bank ("City Federal"), a federally insured savings association. CityFed Financial Corporation ("CityFed") was created in 1984 as a "shell" corporation to acquire City Federal. This action arises out of a series of orders issued by the OTS in connection with an administrative proceeding currently pending against CityFed and several current and former directors.

City Federal was acquired pursuant to a Net Worth Maintenance Agreement by which CityFed agreed to maintain City Federal's net worth at a specified level. In December of 1989 OTS declared City Federal insolvent after it determined that City Federal's net worth had fallen below the required level. OTS appointed the Resolution Trust Corporation ("RTC") as Receiver.

As a result, OTS instituted enforcement proceedings against CityFed and seven current and former directors. On June 2, 1994 OTS issued a Notice of Charges and Hearing ("Notice of Charges") against CityFed and its directors pursuant to 12 U.S.C. §§ 1818(b) and 1818(i). The Notice of Charges seeks restitution and civil penalties for the shortfall in City Federal's net worth. In addition, OTS issued a Temporary Cease and Desist Order (OTS Order No. AP 94-27)("Temporary Order") pursuant to 12 U.S.C. 1818 (c) (1) . This Temporary Order prevents CityFed from transferring or dissipating its assets while the administrative proceeding is pending. The Temporary order also contains a socalled

"hardship provision" which allows CityFed to request relief from the Temporary Order if any provision "threatens to cause undue hardship to CityFed in conducting its business or affairs."

Plaintiffs are not named in the administrative proceeding. However in 1992 the RTC named plaintiffs as co-defendants in a suit brought against Fidelity & Deposit Company of Maryland in federal district court in New Jersey. As Receiver for City Federal the RTC sought to recover a $7 million loss suffered on the extension of a $30 million line of credit to Northwest Mortgage Company ('Northwest") which City Federal had approved in 1987. The RTC alleged that plaintiffs had engaged in "fraud and/or intentional dishonesty" involving the Northwest loan.

Claiming a right under CityFed's by-laws plaintiffs demanded from CityFed an advance for attorneys' fees and costs incurred in defending the RTC action. CityFed refused and plaintiffs filed an action in federal district court in New Jersey for a preliminary injunction. This motion was denied by the district court. The Third Circuit reversed the district court's order in Ridder v. CityFed Financial Corp., 47 F.3d 85 (3rd Cir. 1995), remanding with instructions that the district court issue an injunction requiring CityFed to advance plaintiffs reasonable defense costs. On June 27, 1995 the district court determined the amount of defense costs to be $437,400 for attorneys' fees with defense costs after that date to be incurred at the rate of $180 per hour.

Roughly about the same time plaintiffs' action against CityFed was proceeding in the Third Circuit, City Fed and its directors sought an injunction in this Court against the

Temporary Order issued by OTS. In CityFed Financial Corp. v. OTS, 919 F.Supp I (D.D.C. 1994) this Court denied CityFed's request for injunctive relief. The decision was affirmed on appeal in CityFed Financial Corp. v. OTS, 58 F.3d 738 (D.C. Cir. 1995).

On July 13, 1995 CityFed requested permission from the OTS to comply with the order entered by the New Jersey district court and pay the plaintiffs' litigation expenses. The OTS issued an Order on August 18, 1995 (OTS Order No. AP 95-32) denying CityFed's request. The Order stated that plaintiffs were not entitled to defense costs as hardship relief because CityFed could disburse funds under this provision of the Temporary Order only to relieve hardship to CityFed itself. OTS stated that "the payment sought by the Ridder plaintiffs could not be made until after CityFed met its net worth maintenance obligations." OTS Order No. AP 95-32 at 6. OTS restated this position in its order issued on April 8, 1996 (OTS Order AP 96-12).

Plaintiffs filed the instant action in this Court on August 28, 1995, seeking injunctive and declaratory relief. Plaintiffs seek an injunction prohibiting OTS from enforcing its Temporary Order and requiring the OTS to authorize CityFed's disbursement of $451,956.99 to plaintiffs for attorneys' fees and costs. Plaintiffs filed a supplemental complaint on April 18, 1996 to include a request for relief from OTS Order No. AP 96-12.[1]

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1. Two relevant events occurred between the filing of plaintiffs' original and supplemental complaints. On February 1, 1996 Administrative Law Judge Arthur L. Shipe

II

Plaintiffs request an injunction suspending or limiting the effect of the Temporary Order issued by OTS. The Court may not grant the relief plaintiffs seek, however, because the Court does not have subject matter jurisdiction to review plaintiffs' claims.

Under Congress' extensive regulation of the savings and loan industry, OTS has substantial power. OTS has the authority to initiate administrative proceedings against insured depository institutions engaging in illegal, "unsound," or "unsafe" practices. 12 U.S.C. § 1818(b)(1). OTS may issue temporary orders requiring a depository institution or "an

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granted OTS' motion for partial summary judgment in the administrative proceeding against CityFed and its directors. The ALJ ordered CityFed pay restitution in the amount of $188.4 million to RTC as Receiver for City Federal. CityFed's administrative appeal is pending.

In addition CityFed appealed the order entered by the district court in New Jersey requiring CityFed to advance plaintiffs' legal expenses. The Third Circuit vacated the district court's order on April 18, 1996, recognizing that the Temporary Order made it impossible for CityFed to comply. The Third Circuit remanded the case to the district court to consider a variety of options, including an order staying its injunction pending resolution of the administrative proceeding. No action has been taken by the district court on remand.

institution-affiliated party" to cease and desist from such practices pending the outcome of administrative proceedings. Id. at § 1818 (c)(1).

To ensure the effectiveness of this regulatory scheme, Congress granted federal courts limited jurisdiction to review the actions of federal banking regulators. CityFed Financial Corp. v. OTS, 58 F.3d 738, 741 (D.C. Cir. 1995). Section 1818(i)(1) provides that

> except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.
>
> 12 U.S.C. § 1818(i)(1).

By the plain language of the statute, challenges to OTS enforcement orders must be brought under section 1818. See Henry v. OTS, 43 F.3d 507, 513 (10th Cir. 1994) ("[i]n section 1818(i) Congress ... explicitly preclud[ed] jurisdiction in any situation except where it had specifically provided for a particular court to exercise jurisdiction.") (citing Board of Governors of Fed. Reserve Sys. v. MCorp Financial, Inc., 502 U.S. 32, 44 (1991)).

Section 1818(c)(2) permits a district court to review the validity of temporary cease and desist orders. This section provides

> Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to . . . the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.
>
> 12 U.S.C. § 1818(c)(2).

A federal court can review a temporary cease and desist order only if the action is initiated by the "depository institution concerned" or an "institution-affiliated party" served with a temporary cease and desist order. Id.

By the clear terms of the statute, plaintiffs may not challenge the Temporary order in this Court. They are not the "depository institution concerned" or an "institution-affiliated party" who has been served with a Notice of Charges or a cease and desist order.[2] They are not parties to

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2. Plaintiffs argue that the Court has subject matter jurisdiction over their claims because they are each an "institution-affiliated party." This is incorrect. The statute

the administrative proceeding, they have not been charged with violations under section 1818(b)(1), and they have not been served with a temporary cease and desist order under section 1818(c)(1).

Plaintiffs argue that despite their third party status they are entitled to judicial review of the OTS Temporary Order. However it is clear that section 1818 does not recognize an independent right to challenge the validity of OTS enforcement orders. While plaintiffs argue convincingly that they have been harmed by the effect of the Temporary Order and the OTS administrative proceeding, this injury does not confer jurisdiction on the Court to enjoin the effect of that Order. Defendants' motion to dismiss the complaint will be granted.

Accordingly, it is this 20th day of June, 1997

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defines this term as "any director, officer, employee, ...or agent for, an insured depository institution...." 12 U.S.C. §1813(u). Plaintiffs maintain that because they were officers of City Federal they meet this definition. However the statute, and common sense, clearly require that the party be institutionally affiliated with the depository institution that is the subject of the challenged order. The Notice of Charges and Temporary Order were served on CityFed. CityFed, not City Federal, is charged with violating the Net Worth Maintenance Agreement and is the subject of the administrative proceedings. Plaintiffs were not officers, directors, employees or agents of CityFed and cannot be considered "institution-affiliated" parties.

ORDERED that plaintiffs' motion for summary judgment be and it is hereby DENIED; and it is further

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment be and it is hereby GRANTED; and it is further

ORDERED that plaintiffs' complaint be and it is hereby DISMISSED.

HAROLD H. GREENE
United States District Judge

CITYFED FINANCIAL CORP., ET AL., APPELLANTS v. OFFICE OF THRIFT SUPERVISION, UNITED STATES DEPARTMENT OF TREASURY AND JONATHAN L. FIECHTER, ACTING DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, APPELLEES

No. 94-5254, Consolidated with No. 94-5255

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

313 U.S. App. D.C. 178; 58 F.3d 738; 1995 U.S. App. LEXIS 16773

May 8, 1995, Argued
July 11, 1995, Decided

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Columbia. (No. 94cv01273).

COUNSEL: Frank J. Eisenhart argued the cause for appellants. With him on the briefs for CityFed Financial Corp. were Arthur W. Leibold, Jr., Bettina L. Alexander and Neil R. Crowley.

Ronald W. Stevens and Douglas M. Kraus were on the briefs for appellants Gordon E. Allen, et al.

Dirk S. Roberts, Assistant Chief Counsel, U.S. Department of Treasury, argued the cause for appellees. With him on the

brief were Carolyn B. Lieberman, Acting Chief Counsel, Thomas J. Segal, Deputy Chief Counsel, and Kerry W. Kircher, Senior Trial Attorney, U.S. Department of Treasury.

JUDGES: Before: EDWARDS, Chief Judge, ROGERS and TATEL, Circuit Judges. Opinion of the Court filed by Circuit Judge TATEL.

OPINIONBY: TATEL

OPINION: [*740] TATEL, Circuit Judge: In June of 1994, the Office of Thrift Supervision issued a temporary cease and desist order against CityFed Financial Corporation that froze virtually all of CityFed's assets. According to OTS, the Corporation failed to use those assets to comply with the net worth requirements for its subsidiary bank, City Federal Savings and Loan, which [**2] OTS had placed into receivership several years earlier. Arguing that the receivership ended its control over its subsidiary and therefore OTS's jurisdiction over it as a "holding company," CityFed sought a preliminary injunction barring OTS from enforcing the temporary order. We agree with the district court that because the alleged violations occurred before the receivership, OTS had jurisdiction to issue the cease and desist order. Because CityFed failed to demonstrate that the temporary cease and desist order would cause it irreparable harm, we also affirm the district court's denial of the preliminary injunction.

I.

The savings and loan industry developed primarily as a

means of "financing the purchase and construction of housing." Transohio Sav. Bank v. Director, OTS, 296 U.S. App. D.C. 231, 967 F.2d 598, 601 (D.C. Cir. 1992); see also H.R. Rep. No. 54, pt. 1, 101st Cong., 1st Sess. 291 (1989) [hereinafter House Report], reprinted in 1989 U.S.C.C.A.N. 86, 87. With the high interest rates of the late 1970s and early 1980s, savings and loans found themselves "locked into long-term, low-yielding, fixed-rate mortgages," while depositors transferred their assets from savings and loans into [**3] higher-yield investments. House Report at 295; see Transohio, 967 F.2d at 602. In an effort to address the resulting financial instability, the federal government significantly deregulated the savings and loan industry, allowing institutions to participate in much riskier investments. See House Report at 294-98. In combination with economic recession, poor management, and some fraud, failed high-risk investments "left the industry struggling for survival, and ... virtually wiped-out its deposit insurance fund." House Report at 292; see also S. Rep. No. 19, 101st Cong., 1st Sess. 7-10 (1989) [hereinafter Senate Report]; Transohio, 967 F.2d at 601-04; see generally Graduate Colloquium 1990-91, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S1, S1-S109 (1991).

In response to the lax regulation and loose capital requirements that it perceived at the root of the savings and loan crisis, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1811 and in scattered sections of U.S.C.). In part, FIRREA was enacted to "establish stronger capital standards [**4] for thrifts," thereby providing "a cushion against losses incurred in times

of poor financial [*741] performance." House Report at 307, 310. According to Congress, "if a crisis of this nature is to be prevented from happening again, thrifts must be adequately capitalized against losses." Id. at 310; see also Transohio, 967 F.2d at 603-04. In addition to establishing these higher capital requirements, FIRREA was enacted to "enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste, and insider abuse." House Report at 307-08. To increase the effectiveness of the regulatory scheme, Congress consolidated many of the powers and duties of the pre-FIRREA regulatory agencies, the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, into the newly-created Office of Thrift Supervision. See American Fed'n of Gov't Employees v. FLRA, 310 U.S. App. D.C. 208, 46 F.3d 73, 74 (D.C. Cir. 1995); Transohio, 967 F.2d at 603; see also FIRREA, § 101(9), (10) (enacting FIRREA to "strengthen the enforcement powers of Federal regulators ... [and] the civil sanctions ... for defrauding or otherwise damaging depository [**5] institutions and their depositors").

Among OTS's powers is its ability to initiate administrative proceedings designed to protect savings and loans. See 12 U.S.C. § 1464(d)(1)(A) (Supp. V 1993) (giving OTS Director authority to enforce 12 U.S.C. § 1818). As authorized by 12 U.S.C. § 1818(b)(1) (Supp. V 1993), these proceedings may begin once OTS determines that "any insured depository institution ... or any institution-affiliated party is engaging or has engaged ... in an unsafe or unsound practice ... or is violating or has violated ... a law, rule, or regulation, or any condition imposed in writing by the

agency." If one of these conditions exists "in the opinion of " OTS, it "may issue and serve upon ...such party a notice of charges." 12 U.S.C. § 1818(b)(1). After this notice and a hearing, the agency may issue a "permanent" cease and desist order that may require the party "to take affirmative action to correct the conditions resulting from any such violation," id., including restitution in cases of "unjust enrichment" or "reckless disregard for the law," 12 U.S.C. § 1818(b)(6) (Supp. V 1993).

In addition to its permanent cease and desist authority, OTS "may issue [**6] a temporary order requiring the depository institution or such party to cease and desist from any ... violation or practice [charged in a section 1818(b)(1) action] and to take affirmative action ... pending the completion of such proceedings." 12 U.S.C. § 1818(c)(1) (Supp. V 1993). OTS can issue such orders, however, only if it determines that the violation ... or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the [administrative] proceedings.

12 U.S.C. § 1818(c)(1).

To ensure that holding companies like CityFed do not escape OTS's regulatory authority, FIRREA made most of

section 1818, including the permanent and the temporary cease and desist powers, applicable "to any savings and loan holding company ... in [**7] the same manner as such subsections apply to a savings association." 12 U.S.C. § 1818(b)(9). Under the statute, a "savings and loan holding company" is "any company which directly or indirectly controls a savings association or controls any other company which is a savings and loan holding company." 12 U.S.C. § 1467a(a)(1)(D) (Supp. V 1993).

To prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies. Thus, with respect to actions under section 1818, section 1818(i)(1) provides that, "except as otherwise provided in this section ... no court shall have jurisdiction to affect by injunction [*742] or otherwise the issuance or enforcement of any notice or order under [this] section, or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1) (Supp. V 1993). Temporary cease and desist orders, however, are reviewable. Section 1818(c)(2) allows subjects of temporary cease and desist orders under section 1818(c)(1) to apply, within ten days, to their home federal [**8] judicial district or to the United States District Court for the District of Columbia "for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings ... and such court shall have jurisdiction to issue such injunction." 12 U.S.C. § 1818(c)(2). It is under this provision that CityFed, the subject of an OTS enforcement proceeding,

initiated this litigation in the district court.

CityFed began operating in 1984 as a savings and loan holding company with control over City Federal Savings Bank. As required by the Federal Home Loan Bank Board, the federal regulatory agency at the time, CityFed signed a net worth maintenance stipulation agreeing to "cause the net worth of City Federal to be maintained at a level consistent with that required by ... the Rules and Regulations for the Federal Savings and Loan Insurance Corporation, as now or hereafter in effect, ... and, as necessary, [to] infuse sufficient additional equity capital, in a form satisfactory to the Supervisory Agent, to effect compliance with such requirement." Stipulation of CityFed Financial Corp. (Dec. 4, 1984), [**9] in Joint Appendix at 30.

Like so many other savings and loans, City Federal's financial position deteriorated in the late 1980s. In a disclosure statement filed with the Securities and Exchange Commission in late 1989, CityFed estimated that City Federal was approximately $ 118 million short of its regulatory capital requirements. The Office of Thrift Supervision, which by then had succeeded the Federal Home Loan Bank Board, sent CityFed a letter on December 6, 1989, demanding that CityFed comply with its net worth maintenance stipulation by infusing as much capital into City Federal as possible. The next day, OTS appointed the Resolution Trust Corporation as receiver for City Federal. Although CityFed took some steps to aid City Federal's financial status, such as hiring consultants, it declined to infuse any of its approximately $12.9 million in assets into City Federal, arguing that its funds would make no significant difference given the magnitude of

the shortfall.

Exercising its authority under 12 U.S.C. § 1818(b)(1), OTS initiated administrative enforcement proceedings against CityFed in June of 1994. In these proceedings, which are still pending before the agency, OTS [**10] alleged, among other regulatory violations, that CityFed had failed to comply with the net worth maintenance stipulation it had signed ten years earlier. OTS sought over $2 million in civil penalties from CityFed as well as restitution of the $118 million shortfall. As authorized by 12 U.S.C. § 1818(c)(1), OTS also issued a temporary cease and desist order that placed severe restrictions on CityFed's use of its assets. This order was a direct response to the fact that from 1989 to 1994, CityFed's assets fell from $12.9 million to less than $9 million, at least in part because of substantial legal fees that CityFed was paying for the defense of it and its directors. To prevent further dissipation of funds that OTS alleges should have been paid into City Federal, the temporary order required CityFed to post security for its assets and limited CityFed's monthly expenditures to $15,000. As a result of this asset freeze, CityFed was unable to pay the legal fees of its directors.

Along with its directors, who intervened in the suit, CityFed sued OTS, asking the district court to enjoin the agency from enforcing the temporary cease and desist order. The district court refused to issue [**11] an injunction against OTS. CityFed appeals, making three arguments. It claims, first, that because City Federal effectively ceased to exist when it went into receivership in 1989, CityFed no longer qualifies as a savings and loan holding company under the statute, thus depriving OTS of jurisdiction to impose a temporary cease

and desist order on it. Second, asserting that its assets have not belonged, [*743] and do not now belong, to a "depository institution," CityFed argues that its activities are not, as required by the temporary cease and desist statute, "likely to cause ... significant dissipation of assets or earnings of the depository institution." 12 U.S.C. § 1818(c)(1). Focusing on its allegation that it is likely to succeed on the merits in the underlying administrative proceeding, it argues finally that it has satisfied the conditions justifying a preliminary injunction.

II.

CityFed does not dispute that it was a savings and loan holding company until December 7, 1989, when City Federal was placed into receivership. Nor does it deny that OTS would have jurisdiction over it if the agency had served a temporary cease and desist order before that date. The company claims that once [**12] OTS acted to protect the interests of City Federal's depositors by putting the institution into receivership, OTS lost its authority to bring administrative proceedings against CityFed.

CityFed's argument, of course, goes beyond a challenge to OTS's jurisdiction in the temporary cease and desist proceedings since OTS's authority to issue the temporary order under section 1818(c)(1) explicitly depends upon its jurisdiction in a "permanent" section 1818(b)(1) cease and desist proceeding. See 12 U.S.C. § 1818(c)(1). Thus, although section 1818(i)(1) prevents us from actually reviewing OTS's jurisdiction in the underlying permanent cease and desist proceedings, see 12 U.S.C. § 1818(i)(1), we

can address CityFed's claims regarding OTS' jurisdiction to issue the temporary order only by examining, as do the parties, OTS's jurisdiction in actions brought under both sections 1818(b)(1) and (c)(1).

Our examination of CityFed's jurisdictional argument begins, and largely ends, with the plain language of those sections. Both authorize the OTS to initiate administrative proceedings and issue a cease and desist order against a "party." 12 U.S.C. § 1818(b)(1) & (c)(1). A "party," according [**13] to the statute, includes a holding company that "has engaged" in an unsafe practice or that "has violated" any conditions imposed on it by law. 12 U.S.C. § 1818(b)(1). In this case, CityFed is a "party" that, as a holding company subject to regulation, allegedly violated the terms of its net worth maintenance agreement with the government. Accordingly, OTS "may issue and serve upon ... such party a notice of charges" and may initiate enforcement proceedings. 12 U.S.C. § 1818(b)(1). Because OTS had the authority to bring the subsection (b)(1) proceedings against CityFed, and because OTS determined that CityFed's violation is likely to cause "significant dissipation of assets" that properly belong to City Federal, subsection (c)(1) authorizes OTS to "issue a temporary order requiring ... such party"--i.e., CityFed--"to cease and desist." 12 U.S.C. § 1818(c)(1). The statute's plain language, therefore, gives OTS jurisdiction over CityFed.

CityFed argues that this language is insufficient, by itself, to give OTS continuing jurisdiction over a former holding company. It points to section 1818(i)(3), which explicitly gives banking agencies jurisdiction over individuals--"institution-affiliated [**14] parties"--for up to six years

after they end their association with an institution. See 12 U.S.C. § 1818(i)(3). According to CityFed, this section proves both that Congress knows how to enact continuing jurisdiction authority if it chooses, and that it did not choose to grant such authority over holding companies. We disagree. Congress included section 1818(i)(3) in FIRREA solely to address the effects of our decision in Stoddard v. Board of Governors, 276 U.S. App. D.C. 153, 868 F.2d 1308 (D.C. Cir. 1989). See, e.g., House Report at 468-69; Senate Report at 377-78 (discussing Senate predecessor of section 1818(i)(3)). In that case, the Office of the Comptroller of the Currency served Stoddard, a former officer of a savings and loan, with "a notice of its intent to remove him from office" under a banking enforcement statute similar to the present section 1818(b)(1). 868 F.2d at 1310. The only problem was that Stoddard had resigned his position a year before he received the notice. Concluding that "one cannot remove what isn't there," and that the agency's construction [*744] "presents a linguistic (and metaphysical) impossibility," we concluded that the agency could not issue a notice removing from [**15] office an officer that had already resigned. Id. at 1310.

The banking agencies and Congress were concerned about the implications of Stoddard because the "removal" provisions that Stoddard limited were the means by which banking agencies barred individuals not only from association with a particular institution, but from all future association with the banking industry. See 12 U.S.C. § 1818(j) (1988) (barring individuals subject to removal orders from future association with the industry). To reinvigorate this method of protecting savings and loan customers from former officers, Congress

enacted section 1818(i)(3). As reports by both houses of Congress and the conference committee make clear, section 1818(i)(3) was not intended to create a new cause of action, but rather to address the statutory ambiguity that Stoddard highlighted and the regulatory gap that it created. See House Report at 393, 468-69; Senate Report at 377-78; H.R. Conf. Rep. 222, 101st Cong., 1st Sess. 440 (1989).

Congress did not need to add similar continuing jurisdiction language to FIRREA regarding "former" holding companies because the statutory language simply did not present similar [**16] ambiguities for such parties, let alone the "metaphysical" difficulties that we perceived in Stoddard. 868 F.2d at 1310. Unlike that case, in which the agency's enforcement authority over former officers rested on its ability to remove from office someone that was no longer in office, OTS's authority over CityFed depends only on whether CityFed is the "party" that was a holding company at the time that it allegedly violated its agreements. See 12 U.S.C. § 1818(b)(1) & (c)(1). Even if CityFed is no longer a holding company, it is indisputably the same "party" that allegedly violated the stipulation. Because jurisdiction over CityFed or other former holding companies presents no "linguistic impossibility" in reading the statute, 868 F.2d at 1310, the absence of explicit authority for continuing jurisdiction over such parties, upon which CityFed places so much reliance, implies nothing.

Our conclusion that OTS has jurisdiction over CityFed finds support in the policies articulated in several factually different yet conceptually similar cases that the parties debate in their briefs. See, e.g., Akin v. OTS, 950 F.2d 1180, 1185 (5th Cir.

1992); Stanley v. Board of Governors, [**17] 940 F.2d 267, 270-71 (7th Cir. 1991); Anaya v. Federal Home Loan Bank Board, 839 F.2d 1349, 1350-51 (9th Cir. 1988); Larimore v. Conover, 775 F.2d 890, 896 (7th Cir. 1985), rev'd on other grounds, 789 F.2d 1244 (7th Cir. 1986) (en banc), superseded by statute, FIRREA § 902 (codified at 12 U.S.C. §§ 1786 & 1818); Paul v. OTS, 763 F. Supp. 568, 573 (S.D. Fla. 1990), aff'd sub nom. Paul v. Ryan, 948 F.2d 1297 (11th Cir. 1991) (table). In each of these cases, former officers of failed savings institutions challenged banking agencies' jurisdiction over them, and in each case, the court rejected the challenge because it conflicted with the intent behind as well as the language of the banking enforcement statutes. Echoing the logic of earlier cases, the Fifth Circuit observed that the officer's interpretation "would allow an institution and its individual officers to ignore regulations, statutes and agreements and commit flagrant violations, and yet retain immunity from cease and desist actions if the violations were sufficiently severe to warrant prompt imposition of receivership. This interpretation belies congressional intent expressed to adopt broader cease and [**18] desist powers with the passage of FIRREA." Akin, 950 F.2d at 1185; see also Stanley, 940 F.2d at 270-71; Larimore, 775 F.2d at 896.

It is true, as CityFed points out, that the post-FIRREA decisions rely at least in part on the language in section 1818(i)(3), which gave banking agencies continuing jurisdiction over institution-affiliated parties. See, e.g., Akin, 950 F.2d at 1185. It is also true that the officer in Larimore received the notice before he resigned, 775 F.2d at 896, a situation in which CityFed admits that OTS would have

jurisdiction. We do not think, however, that these distinctions influenced the policy rationales articulated in those decisions. Instead, each rationale rested primarily on a [*745] common understanding, shared by us, that FIRREA and its predecessor statutes were intended to protect savings and loans and their customers, not those whose management practices risked the well-being of the institutions. The policies articulated in those decisions are thus entirely applicable here.

As in the decisions from the Fifth, Seventh, and Ninth Circuits, our plain reading of sections 1818(b)(1) and (c)(1) comports rather than conflicts with our understanding [**19] of statutory purpose. Compare Stoddard, 868 F.2d at 1311 (rejecting appeal to "congressional purpose" because it could not "be reconciled with the language of the statute"). CityFed's theory would allow holding companies to get off "scot-free" if they act carelessly enough to force OTS to appoint a receiver. Stanley, 940 F.2d at 270. Neither language nor purpose compels us to create such an incomprehensible loophole in FIRREA's comprehensive regulatory scheme.

Claiming that the agency has alternative ways to accomplish its objectives with respect to former holding companies, CityFed argues that it would not necessarily escape all liability were we to adopt its interpretation of the statute. Its proposed alternatives, however, do not offer a practical substitute for OTS's cease and desist authority. For example, it argues that the "Federal banking agency that succeeded to the government's rights under the net worth maintenance stipulation ... could have brought [a contract] action against CityFed for the alleged violation of that stipulation." CityFed Brief at 19 n.18. Yet in the same breath, CityFed undermines

its own assertion that this method would be a plausible enforcement [**20] alternative by arguing that "there is [a] substantial question" regarding whether the stipulation could be enforced as a contract. Id. at 31 n.23. CityFed further claims that OTS could always protect its jurisdiction by initiating enforcement proceedings before it places an institution into receivership. This presumes, of course, that OTS has the time to conduct the investigation that must precede the filing of administrative claims. If, as is likely, the institution's financial status is deteriorating, OTS has little choice but to place it into receivership. It makes no sense that Congress would have required the agency to choose between risking the financial well-being of the institution and using FIRREA's carefully-considered statutory enforcement process to recover from those responsible for the institution's downfall.

III.

As a basis for its issuance of the temporary cease and desist order, OTS concluded that CityFed was "likely to cause ... significant dissipation of assets or earnings of the depository institution." 12 U.S.C. § 1818(c)(1). CityFed argues that this is impossible because its assets have never belonged to City Federal. According to OTS, however, CityFed [**21] improperly refused to use its available assets to support the net worth of City Federal, and so at least for purposes of the temporary cease and desist order, we should consider those funds to be assets "of the depository institution." We agree with OTS. CityFed--or any other owner of assets that allegedly should have been paid into a now-defunct savings institution--is hardly in a position to argue that it can spend

those assets with impunity when the institution's downfall may have resulted, at least in part, from its retention or accumulation of those assets.

The cases that discuss dissipation under section 1818 find no significance in the fact that assets belong not to the institution, but to a party that has allegedly done it wrong. See, e.g., Parker v. Ryan, 959 F.2d 579 (5th Cir. 1992) (upholding temporary cease and desist order to prevent dissipation of former officer's assets); Spiegel v. Ryan, 946 F.2d 1435, 1438 (9th Cir. 1991) ("Restitution may not only compensate an institution for past wrongs, but may also serve to prevent the dissipation of assets that may belong to it, and thereby prevent prejudice to its depositors." (emphasis added)), cert. denied, [**22] 503 U.S. 970, 118 L. Ed. 2d 304, 112 S. Ct. 1584 (1992). According to CityFed, these cases are distinguishable because the targeted party was alleged to have defrauded the institution, so there were at least allegations that the party's assets had, at one time, belonged to the institution. The critical allegation in those cases, however, was not fraud, but the [*746] claim that the targeted party owned assets that allegedly should have been in the hands of the depository institution. See, e.g., Parker, 959 F.2d at 583 n.4 (noting that the bulk of OTS's allegations underlying a temporary order were based on the exercise of "poor business judgment" and the improper allocation of dividends to third parties, not fraud). That is exactly what OTS has alleged here. As in Spiegel and Parker, then, the temporary cease and desist order in this case properly issued on the basis of OTS's allegations that CityFed was dissipating assets to which City Federal may legally have been entitled.

Citing Webster's New Collegiate Dictionary, CityFed also argues that dissipation implies "waste," and that no dissipation has occurred because its expenditures were reasonable. Webster's, however, also defines dissipate as "to lose ... irrecoverably" [**23] and "to spread ... thin to the point of vanishing." Webster's New Collegiate Dictionary 331 (1973). None of these definitions requires that the spreading be wasteful. Because OTS reasonably believes that CityFed possesses assets that properly belong to City Federal, CityFed's unmonitored spending "is likely to cause ... significant dissipation of assets" of City Federal. The temporary cease and desist order was thus proper, although we express no view on whether OTS will ultimately be able to order CityFed to make restitution of those funds in light of its failure to comply with the net worth maintenance agreement. See Rapaport v. OTS, 59 F.3d 212, 1995 U.S. App. LEXIS 16771 (D.C. Cir. 1995) (discussing standards for finding "unjust enrichment").

IV.

We turn finally to CityFed's argument that the district court erred in failing to grant a preliminary injunction against the temporary cease and desist order. To prevail, CityFed must demonstrate 1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public [**24] interest would be furthered by the injunction. See Sea Containers Ltd. v. Stena AB, 281 U.S. App. D.C. 400, 890 F.2d 1205, 1208 (D.C. Cir. 1989). We review a district court decision regarding a preliminary injunction for

abuse of discretion, and any underlying legal conclusions de novo. See 890 F.2d at 1208-09; Transohio, 967 F.2d at 614. In denying the preliminary injunction, the district court concluded that CityFed had not demonstrated irreparable injury, and we agree.

The company has articulated at least three different theories of irreparable injury. In its initial brief in this court, the company asserted that OTS's lack of enforcement authority amounted to per se irreparable injury. In the district court, CityFed claimed that it risked bankruptcy, and its directors claimed that they are unable to afford defenses to the legal proceedings to which they are parties. Finally, CityFed argues in its reply brief that the Third Circuit has required it to pay the legal fees of former directors of its former subsidiary, which it cannot do under the OTS order.

Our conclusion that OTS had authority to issue the temporary order disposes of CityFed's first claim of irreparable injury. Its second is [**25] equally unpersuasive. As the district court pointed out, CityFed is not truly threatened with bankruptcy. OTS's temporary cease and desist order allows the company to spend a certain amount of its assets each month to meet expenses, and it also permits the company to request "hardship" relief from the requirements of the order, an exception that CityFed has yet to invoke. As for the individual directors, the district court concluded that they have sufficient personal assets to meet their legal needs. CityFed Financial Corp. v. OTS, No. 94cv1273, at 4 (D.D.C. Sept. 8, 1994) (denying motion for preliminary injunction). If a director's personal assets are not enough, the order's "hardship" provision offers one way that CityFed can provide

additional funds. Also, according to the district court, OTS has agreed to allow CityFed to advance fees to the directors as long as they agree to return the fees should CityFed lose in the administrative proceeding. The directors have rejected this offer. See id. at 4-5. With respect to the Third Circuit order, see Ridder v. CityFed, 47 F.3d 85 (3rd Cir. 1995), the [*747] "hardship" provision again provides a possible means for CityFed to comply [**26] with both that order and OTS's requirements. Even if OTS refuses to grant CityFed's "hardship" request, the company could still petition the Third Circuit for a stay pending the resolution of OTS's cease and desist proceedings. At the very least, the request would present the Third Circuit with a new issue because its decision--which was based on a state law interpretation of the indemnity agreement that CityFed has with those officers--did not consider the OTS order. Because CityFed has not pursued these alternatives, we conclude that the district court was correct in finding that CityFed has not demonstrated irreparable injury.

In deciding whether to grant an injunction, the district court must balance the strengths of the requesting party's arguments in each of the four required areas. If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak. An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury. See Population Inst. v. McPherson, 254 U.S. App. D.C. 395, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (appendix, [**27] reprinting per curiam order granting motion for injunction pending appeal). Despite this flexibility, we require the moving party to

demonstrate at least "some injury," id.; see, e.g., Sea Containers, 890 F.2d at 1210-1211 (upholding district court decision denying request for preliminary injunction where moving party may have been "likely to succeed" but did not carry burden of showing irreparable harm), since "'the basis of injunctive relief in the federal courts has always been irreparable harm.' " Sampson v. Murray, 415 U.S. 61, 88, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959)). Because CityFed has made no showing of irreparable injury here, that alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting CityFed's request. We thus need not reach the district court's consideration of the remaining factors relevant to the issuance of a preliminary injunction.

V.

In the world of savings and loan regulation envisioned by CityFed, a bank holding company that takes on net worth maintenance obligations has an incentive to act as recklessly as possible in order to build up its own assets while so [**28] injuring the stability of its subsidiary institution that federal banking agencies would have no choice but to place it into receivership. Once in receivership, the holding company could freely use "its" assets as it saw fit, leaving nothing but the depleted assets of the subsidiary institution for the federal government and taxpayers to pick through in search of compensation for the holding company's reckless behavior. Because such a vision is contrary to the language and purposes of FIRREA, we reject it and affirm the decision of the district court. OTS had jurisdiction over CityFed and

statutory authority to issue the temporary cease and desist order against it, and the district court did not abuse its discretion in concluding that CityFed had not met the prerequisites for a preliminary injunction.

So ordered.

Constitution

Article I Section 8 provides:

> The Congress shall have Power * * *
> [9.] To constitute tribunals inferior to the Supreme Court.

Article I Section 9 provides:

> [.3] No Bill of Attainder or ex post facto Law shall be passed.

Article III Section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III Section 2 provides:

> The judicial Power shall extend to all cases, in Law and equity, arising under this Constitution, the Laws of the United States ....

Amendment 5:

> No person shall ... nor be deprived of life, liberty or property without due process of law.

Statutes

12 USC §1813(u) states:

> Institution-affiliated party. The term "institution-affiliated party" means -
>
> > (1) Any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution.
>
> * * *

12 USC §1813(w) states:

> Definitions relating to affiliates of depository institutions. (1) Depository institution holding company. The term "depository institution holding company" means a bank holding company or savings

and loan holding company.

* * *

12 USC §1818(b)(3) states:

> This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any bank holding company....

12 USC §1818(c)(2) states:

> Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to * * * the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation or effectiveness of such order pending the completion of the administrative proceedings....

12 USC Section 1818(i) states:

> (1) The appropriate Federal banking agency may in its discretion apply to the United States district court ... for the enforcement of any ... order issued under this section ... and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 38 or 39 no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

28 USC Section 1331 states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Regulations

12 CFR 545.121 provides:

> A Federal savings association shall indemnify its directors, officers, and employees in accordance with the following requirements:
>
> . . .
>
> (f) . . . [A]n association which has a bylaw in effect relating to indemnification of its personnel shall be governed solely by that bylaw * * *

CityFed's Bylaws Article XI Section 1 provides:

> A. Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding ... by reason of the fact that he or she ... is or was an employee of CityFed or a subsidiary thereof ... shall be indemnified and held harmless by the Corporation to the fullest extent authorized by Delaware Corporation Law .... The right to indemnification ... shall be a contract right and shall include the right to be paid the expenses incurred in defending any such proceeding in advance of its final disposition, provided, however, that, if the Delaware Corporation Law so requires, the payment of such expenses ... shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such employee, to repay all amounts so advanced if it shall ultimately be determined

that such employee is not entitled to be indemnified under this Paragraph A or otherwise. * * * *

Supreme Court, U.S.
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No. 98-970

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLEM RIDDER, ET AL., PETITIONERS

v.

OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' challenge to a temporary cease-and-desist order issued by the Office of Thrift Supervision is barred by 12 U.S.C. 1818(i)(1).

2. Whether dismissal of petitioners' suit pursuant to Section 1818(i)(1) violates petitioners' rights under the Due Process Clause of the Fifth Amendment.

3. Whether this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides a basis for the district court to exercise jurisdiction over petitioners' suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 146 F.3d 1035. The opinion of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1998. A petition for rehearing was denied on September 17, 1998 (Pet. 2). The petition for a writ of certiorari was filed on December 14, 1998. The petition invokes the jurisdiction of this Court under 28 U.S.C.

1254(a) (see Pet. 2), which we assume to be a reference to 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioners are former officers of a second tier subsidiary of CityFed Financial Corporation (CityFed). CityFed is a holding company that was created in 1984 to acquire City Federal Savings Association (City Federal), a federally insured savings association. The Federal Home Loan Bank Board, the predecessor of respondent Office of Thrift Supervision (OTS), approved that acquisition subject to the condition that CityFed maintain City Federal's net worth at the required level and, if necessary, infuse additional equity capital into City Federal. CityFed failed to honor that condition. In 1989, OTS declared City Federal insolvent and appointed the Resolution Trust Corporation (RTC) as receiver. Pet. App. A3-A4.

In 1994, acting pursuant to 12 U.S.C. 1818(b), OTS commenced an administrative enforcement proceeding against CityFed and seven of its current and former officers. OTS charged that CityFed and its officers had permitted City Federal's net worth to fall $118 million short of minimum regulatory capital requirements, and the agency sought restitution in that amount. At the same time, pursuant to 12 U.S.C. 1818(c), OTS issued a temporary cease-and-desist order (Temporary Order) against CityFed to prevent further dissipation of CityFed's assets, which had shrunk considerably after the RTC's appointment as receiver for City Federal. The Temporary Order, which remains in place, bars

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[1] The petition identifies Jonathan L. Fiechter, a former Acting Director of the Office of Thrift Supervision, as a respondent. Ellen S. Seidman, the current Director, is the proper party respondent.

CityFed from transferring funds or assets, except for payment of its own operating expenses, not to exceed $15,000 per month, and its own legal expenses. Petitioners are not parties to the administrative proceeding brought by OTS against CityFed. They are not named in the Temporary Order and were not served with that Order. Pet. App. A4-A5, A10.

2. In 1992, the RTC commenced a separate proceeding against petitioners in the United States District Court for the District of New Jersey, alleging fraud and breach of fiduciary duty. Petitioners sought advancement of their defense costs from CityFed pursuant to a provision of CityFed's bylaws. After CityFed refused payment, petitioners filed an action to compel CityFed to advance the funds. Pet. App. A5.

The district court denied petitioners' motion for a preliminary injunction. *Ridder* v. *CityFed Fin. Corp.*, 853 F. Supp. 131 (D.N.J. 1994). The court of appeals reversed and remanded to the district court. *Ridder* v. *CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1995). In light of the limited record before it, however, the court of appeals specifically declined to address the impact of the Temporary Order. *Id.* at 87-88.

On remand, the district court entered an injunction directing CityFed to advance petitioners' defense costs. CityFed appealed, contending that the injunction conflicted with the Temporary Order. In an unpublished opinion issued in April 1996, the Third Circuit vacated the injunction, finding that the Temporary Order barred CityFed from advancing petitioners' legal fees and expenses, and again remanded the case to the district court. See Pet. App. A6.

3. In the interim, CityFed and its directors brought an action against OTS to enjoin enforcement of the Temporary Order. The district court denied the motion

for a preliminary injunction. *CityFed Fin. Corp.* v. *OTS*, 919 F. Supp. 1 (D.D.C. 1994). The court of appeals affirmed, upholding OTS's authority to issue the Temporary Order and finding that CityFed and its directors had failed to demonstrate irreparable harm. *CityFed Fin. Corp.* v. *OTS*, 58 F.3d 738 (D.C. Cir. 1995); Pet. App. C1-C21. After the D.C. Circuit issued its decision, CityFed sought permission from OTS to pay the costs that petitioners incurred in defending against the RTC action. *Id.* at A6. OTS refused to permit CityFed to make the payment. *Ibid.*

4. Petitioners then filed this action against OTS, alleging that the Temporary Order deprived them of their right to receive advance payment of attorneys' fees from CityFed in violation of various constitutional provisions. The district court dismissed petitioners' complaint, holding that it lacked subject matter jurisdiction to consider their claims. Pet. App. B1-B9.

The district court relied on 12 U.S.C. 1818(i)(1), which provides in relevant part that "except as otherwise provided in this section * * * no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under [this] section, or to review, modify, suspend, terminate, or set aside any such notice or order." Petitioners contended that their suit was authorized by 12 U.S.C. 1818(c)(2), which states that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court * * * for an injunction." The district court found that provision to be inapplicable to petitioners' suit, explaining that petitioners "are not the 'depository institution concerned' or an 'institution-affiliated party'

who has been served with a Notice of Charges or a cease and desist order." Pet. App. B7. The court acknowledged that petitioners "have been harmed by the effect of the Temporary Order and the OTS administrative proceeding," but it concluded that "this injury does not confer jurisdiction on the Court to enjoin the effect of that Order." *Id.* at B8.

5. The court of appeals affirmed. Pet. App. A1-A14. The court first held that Section 1818(c)(2) was inapplicable to petitioners' suit and that the suit was therefore barred by Section 1818(i)(1). *Id.* at A8-A11. The court explained that "[b]ecause [petitioners] were not served with (or named in) the Notice of Charges or the Temporary Order, they * * * are statutorily ineligible to file suit under" Section 1818(c)(2). *Id.* at A10.

The court of appeals also rejected petitioners' alternative argument that the district court should have exercised jurisdiction pursuant to *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and its progeny. Pet. App. A11-A12. The court relied on *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), in which this Court held that 12 U.S.C. 1818(i), unlike the statutory scheme at issue in *Kyne*, "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the [banking agencies'] ongoing administrative proceedings." *MCorp*, 502 U.S. at 44 (quoted at Pet. App. A12).

The court of appeals also held that petitioners had failed to make a clear and convincing showing that the Temporary Order violated their constitutional rights. Pet. App. A12-A14. The court observed that "the Fifth Amendment's Due Process Clause 'does not apply to the indirect adverse effects of government action.'" *Id.* at A13 (quoting *O'Bannon* v. *Town Court Nursing Ctr.*,

447 U.S. 773, 789 (1980)). The court explained that petitioners

> were not named in the Temporary Order, nor did the Temporary Order serve to restrict [petitioners'] use of their own assets. Accordingly, any harm the [petitioners] have suffered from the issuance of the Temporary Order was a consequential result of a lawful action OTS directed towards [CityFed], and therefore was no due process violation.

Ibid. The court noted as well that CityFed, "the directly regulated party, * * * had a strong interest in challenging the Temporary Order, as evidenced by its separate lawsuit challenging the order." *Id.* at A14.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 23-26) that, because they are employees of City Federal, a "depository institution," they are "institution-affiliated part[ies]" authorized to bring suit under 12 U.S.C. 1818(c)(2). That argument is without merit. Section 1818(c)(2) provides that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court * * * for an

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[2] After the District of Columbia Circuit issued its decision in this case, petitioners settled the action brought against them by the RTC. See Pet. 8. We are informed by OTS that the enforcement proceeding against CityFed remains pending before an administrative law judge.

injunction." Even assuming that petitioners could be characterized as "institution-affiliated" persons, they have not been served with the Temporary Order and are not *parties* to the administrative proceeding. See Pet. App. A10. They are consequently not entitled to seek judicial review of the Temporary Order pursuant to Section 1818(c)(2).

2. Contrary to petitioners' suggestion (Pet. 8-15), this case does not present any question concerning congressional power to foreclose all judicial review of OTS actions. Section 1818(c)(2) provides for review of temporary cease-and-desist orders—including the Temporary Order at issue in this case—in an action brought by the "depository institution concerned" or by "institution-affiliated part[ies]" that have been served with the temporary order to cease and desist. Indeed, CityFed and its directors invoked that provision in their unsuccessful challenge to the Temporary Order. See pp. 3-4, *supra*. In addition, should OTS issue a final order against CityFed in the underlying administrative proceeding, CityFed will have the right to challenge that order in an action brought in the court of appeals pursuant to 12 U.S.C. 1818(h)(2).

Thus, both the Temporary Order and any final order entered by OTS will be subject to judicial review. The fact that petitioners are not among the parties authorized to seek review of those orders is neither anomalous, cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349-352 (1984), nor unconstitutional. This Court has repeatedly held that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980). The Due Process Clause "has always been understood as referring only to a direct appropriation, and not to

consequential injuries resulting from the exercise of lawful power." *Ibid.* (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)).

As the court of appeals recognized (see Pet. App. A13), any harm that petitioners may have suffered from the Temporary Order is simply an indirect and consequential result of the OTS's lawful exercise of enforcement authority against CityFed. The Temporary Order was issued against CityFed, not petitioners. It restrains CityFed's use of its assets and does not restrict in any way petitioners' use of their own funds. CityFed —the party directly affected by the Temporary Order —has a strong incentive to contest the government's enforcement action and, indeed, has pursued such a challenge. *Id.* at A13-A14; compare *O'Bannon*, 447 U.S. at 790 n.22. Although petitioners were undoubtedly affected by the Temporary Order, they have no constitutional right to a hearing on the propriety of that administrative action.[3]

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[3] Petitioners' reliance (Pet. 20-23) on *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), is misplaced. The Court in *Coit* held that a claimant was not required to comply with an administrative exhaustion requirement imposed by agency regulation where delays in the administrative process rendered that remedial scheme inadequate. *Id.* at 586-587. Nothing in *Coit* suggests that delays in an administrative enforcement process can serve as a basis for a federal court to adjudicate claims falling outside its statutory jurisdiction.

Petitioners also assert (Pet. 3), without explanation, that the issue raised in their petition is "similar" to the question before the Court in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (argued Nov. 4, 1998). We disagree. Apart from the fact that both cases present questions concerning the authority of the federal courts to review specific categories of administrative action, there is no meaningful similarity between the two.

3. Petitioners' reliance (Pet. 18-20) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), is misplaced. As this Court observed in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), "the clarity of the congressional preclusion of review in" Section 1818(i)(1) distinguishes this case from *Kyne*. 502 U.S. at 44; see Pet. App. A12. In this case, as in *MCorp*, Section 1818(i)(1) "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction." 502 U.S. at 44.

4. Even if the questions presented otherwise warranted this Court's review, the current posture of the various proceedings involving OTS, the RTC, petitioners, and CityFed would make review inappropriate. As noted above (see note 2, *supra*), petitioners have settled the action that the RTC brought against them. The only claim that petitioners brought in the instant suit is a claim for advancement of costs to facilitate their defense of that action. Now that the RTC action against them has been settled, however, petitioners' claim for advancement of costs is essentially moot, leaving only a potential claim for indemnification.

At this stage of the administrative enforcement proceedings against CityFed, it is unclear whether OTS will issue a final cease-and-desist order against CityFed pursuant to 12 U.S.C. 1818(b)(1). If OTS issues such an order, CityFed will have the opportunity to challenge it pursuant to 12 U.S.C. 1818(h)(2). See p. 7, *supra*. If the charges against CityFed are ultimately dismissed, the Temporary Order will dissolve and no longer bar CityFed from disbursing funds. See 12 U.S.C. 1818(c). It is therefore uncertain what permanent impact, if any, the administrative proceedings against CityFed will ultimately have on petitioners' ability to recoup the costs of their defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

WILLEM RIDDER ET AL., PETITIONERS,

v.

OFFICE OF THRIFT SUPERVISION, ET AL.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED BY REPLY

Do petitioners lack standing to challenge the two OTS orders which deny payment to them of attorneys fees and costs of defense because petitioners were not served with the original OTS Temporary Order and are not parties named in the heading of the two subsequent OTS Orders denying payment to them?

No. 98-970

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

WILLEM RIDDER ET AL., PETITIONERS,

v.

OFFICE OF THRIFT SUPERVISION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

JURISDICTION

Petitioners seek certiorari under 28 USC §1254(1). This reply brief is filed under Supreme Court Rule 15.6.

STATEMENT

The Solicitor General asserts that petitioners Ridder, Merkle, Hurst and DeVany lack standing to bring action against the OTS on the two OTS orders denying CityFed Financial Corporation leave to pay them attorneys fees and costs of defense ordered by the Third Circuit because "they have not been served with the [original] Temporary Order [No. AP 94-27 dated June 2 1994] and are not *parties* to the administrative proceeding." (Brief for Respondents in Opposition p 7)[Emphasis in original].

ARGUMENT

The Solicitor General's contention neglects the Supreme Court's definition of standing. As stated by Chief Justice Warren in *Flast v. Cohen*, 392 US 83 at 99 (1968):

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 US 186, 204 (1962).

Justice Scalia summarized the requirements for standing

in *Lujan v Defenders of Wildlife*, 504 US 555 at 560-561 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, see id. [*Allen v. Wright*, 468 US 737(1984)] at 756; *Warth v. Seldin*, 422 US 490, 508 91975); *Sierra Club v. Morton*, 405 US 720, 740-741 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore [v. Arkansas*, 495 US 149 (1990)] at 155 (quoting *Los Angeles v Lyons*, 461 US 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 US 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id* at 38, 43.

Petitioners meet all three requirements of standing as outlined by the Supreme Court. The Solicitor General's observation that Ridder, Merkle, Hurst and DeVany were not *parties* named in the heading of the OTS Orders 95-32 dated August 18 1995 and 96-12 dated April 8 1996 emphasizes the denial of due process of law to petitioners: CityFed *opposed* making payment to petitioners. The two OTS orders cited deal

only with the right of petitioners to recover their attorneys fees and costs of defense from CityFed Financial. The only parties *injured* by the OTS orders were petitioners. CityFed Financial was *benefitted* by the OTS orders refusing payment to petitioners.

The Solicitor General contends that CityFed Financial's right to appeal in the indefinite future - when (if ever) the OTS completes its hearings - somehow provides due process of law to petitioners Ridder, Merkle, Hurst and DeVany who have been denied their adjudicated right to recover attorneys fees and costs of defense. But CityFed Financial got from the OTS exactly what it wanted - an order that CityFed Financial did *not* have to pay attorneys fees and costs of defense to Ridder, Merkle, Hurst and DeVany.

The OTS contention that the CityFed Financial right of appeal in the indefinite future provides due process to Ridder, Merkle, Hurst and DeVany defies logic, common sense[1] and the Supreme Court precedents defining standing.

CONCLUSION

For the reasons stated the Supreme Court should reject the Solicitor General's contention that petitioners lack standing to challenge the OTS orders and grant the petition for certiorari.

Dated February 10 1998

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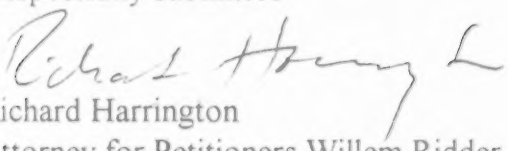
[1] "They [the poor] have to labor in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, *Le Lys rouge* (1894) ch 7.

Respectfully submitted



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